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PREFACE

TO

THE FIRST EDITION.



THE subject of the following treatise comprehends a great variety of points, in which the public are very generally interested. In the ordinary course of human affairs, almost all persons at some period of their lives are called to exercise the office of a personal representative, or to transact business with such as are invested with it. An attempt, therefore, to unfold its nature, to describe its rights, and to point out its duties, as there is no modern work of any reputation which professes exclusively to treat of these topics, will, I persuade myself, be regarded with favour.

The book of the most distinguished merit on this subject, is that which is entitled, “The Office, and

Duty of Executors;” and which, although it bear the name of Thomas Wentworth, is now generally ascribed to Mr. Justice Dodderidge. It was first published anonymously in the year 1641: to the third edition, printed in the same year, was prefixed, for the first time, the fictitious name I have just mentioned. The eighth edition appeared in 1689, to which Chief Baron Comyns, in his Digest, constantly refers. In 1703, the ninth edition was published, with a supplement by H. Curzon: the twelfth edition was published in 1762, with references by a Gentleman of the Inner Temple; and in 1774, the thirteenth and last edition, by Mr. Serjeant Wilson.

Of the original work it is no undue praise to assert, that it is worthy the pen of so learned an author. It is calculated to engage the attention of the reader, and contains very sound principles, and authentic information. At the same time it must be confessed, that it is often uncouth, and sometimes obscure in its language: altogether inartificial in its method: and of necessity defective in regard to later adjudications: which at law are numerous and important: and in equity constitute a new system.” It is also silent respecting the office of an administrator. Nor is it much indebted to its several editors. The supplement, as it is called, is

a mere collection of cases, without order; and without precision.

Under these circumstances I was induced to compile the present treatise. The subject appeared to me capable of an arrangement more natural and distinct than any which has hitherto been adopted. Such arrangement I have endeavoured to form, and to preserve. It has also been my object to comprise the multifarious matter, of which I have been treating, within as narrow limits as it would admit: and to express myself at once with brevity and with clearness. The authorities I have stated very fully in the margin, with a view of facilitating farther researches into points of a nature so interesting, and of so perpetual a recurrence. And it will afford me much satisfaction, if I shall have contributed to extend so useful a species of knowledge.



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ERRATA.

Page 4, note (3), after *White v. Helmes*, add “and in *Maryland. Rush v. Sowerwine*, 3 Harr. & Johns. 97.”

Page 14, note (5), after 2 Yeates, 171, add “*Wilnot’s Lessee v. Tulbot*, 3 Harr. & Millen. 2.”

Page 90, for the paragraph in the text, “but from among persons in equal degree, in case they apply, the ordinary has the power of making his election”—refer to *Taylor v. Delancy*, 2 Caine’s Cases in Error, 143.

Page 146, 10th line from the bottom, instead of *Girard v. McDermott*, 6 Serg. & Rawle, 128, read 5 Serg. & Rawle, 128.

Page 444, to end of note (2) add “*Reno, Ex. v. Davis*, 4 Hen. & Munf. 388.”

THE
LAW OF EXECUTORS
AND
ADMINISTRATORS.

BOOK I.
OF THE APPOINTMENT OF EXECUTORS
AND ADMINISTRATORS.

CHAP. I.

OF WILLS AND CODICILS—WHO MAY MAKE THEM—WHO NOT—
HOW THEY ARE ANNULLED OR REVOKED—HOW REPUBLISHED.

BEFORE I enter on the subject of this treatise, I shall state some general propositions in regard to wills.

A will, or testament, is defined to be the legal declaration of a party's intentions, which he directs to be performed after his death (*a*). (1)

A will may relate either to real, or to personal property. In the former case, it is denominated a devise, which is an appointment of a person to take in the nature of a convey[2]ance, although fluctuating till the testator's death, and will pass only such estate as he was seised of at the time of making it(*b*); the right to devise

- (*a*) 2 Bl. Com. 499, 500. Swift v. Roberts, Amb. 619. Oke v.
(*b*) 4 Bac. Abr. 242. 2 Bl. Com. 378. Heath, 1 Ves. 141. Brydges v. Duch. of
501. Wind v. Jekyl, 1 P. Wms. 575. Chandos, 2 Ves. Jun. 427.

(1) Per *Johnson J.* 1 M'Cord's Rep. 522. 2 M'Cord's Rep. 522. Per *Duncan J.* 4 Serg. & Rawle, 546. And it is not indispensable that the testator should originally have executed a paper as and for a will, provided he afterwards adopts it as such; therefore if it be executed as, or called a deed in the body of it, yet if made with a view to the disposition of a man's estate upon his death, it will enure as a will. *Lyles v. Lyles*, 2 Nott & M'Cord, 531. *Henry v. Bullard*, 2 Car. Law Rep. 595. See *Milledge v. Lamar*, 4 Desaus. Rep. 623. When a testamentary disposition of the writer's estate is intended to be made by it, a letter (*Morrell v. Dickey*, 1 Johns. Cha. Rep. 153) or memorandum may be a will; but there must be an advised purpose shown by the paper to make a *present* testamentary disposition, and not the intention to do some *future* act. *Stein v. North*, 3 Yeates, 324. *McGee v. McCants*, 1 M'Cord, 517. *Plumstead's Appeal*, 4 Serg. & Rawle, 545. *Shields v. Irwin et al.* 3 Yeates, 389. *Toner v. Tuggart*, 5 Binn. 490.

arising from the stat. 32 *Hen. 8. c. 1.* which enacts, that persons *having* lands may devise the same. By the statute of frauds and perjuries, 29 *Car. 2. c. 3. (1)* it shall not only be in writing,(2) but

(1) Passed in 1676, to take effect from and after *June 24th, 1677.*

(2) In *Pennsylvania*, by the Act of Assembly of 1705, (Purd. Dig. 800., 1 Dall. Laws, 53., 1 Sm. Laws, 33.) sect. 1, it is provided, "that all wills in writing wherein or whereby any lands, tenements, or hereditaments, within this province, have been, are, or shall be devised, being proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province, or being proved in the Chancery in England, and the bill, answer, and depositions transmitted hither, under the seal of that Court, or being proved in the hustings, or Mayor's Court in London, or in some manor Court, or before such as shall have power in England, or elsewhere, to take probates of wills, and grant letters of administration, and a copy of such will with the probate thereof annexed or indorsed, being transmitted hither, under the public or common seal of the Courts or offices where the same have been or shall be taken or granted, and recorded or entered in the Register general's office in this province, shall be good and available in law, for the granting, conveying and assuring of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed; and the copies of all wills, and probates, under the public seals of the Courts or offices where the same have been or shall be taken or granted respectively, other than copies or probates of such wills as shall appear to be annulled, disproved, or revoked, shall be judged and deemed, and are hereby enacted to be matter of record, and shall be good evidence to prove the gift or devise thereby made; and all such probates, as well as all letters of administration granted out of this province, being produced here, under the seals of the Courts or offices granting the same, shall be as sufficient to enable the executors or administrators, by themselves or attorneys, to bring their actions in any court within this province, as if the same probates or letters testamentary or administrations were granted here, and produced under the seal of the Register general's office of this province."

Previous to the passage of the act of 1705, it was enacted by the first Assembly, held at *Chester*, in *December 1682*, in pursuance of the laws agreed upon in *England* in *March* of the same year, "that all wills in writing, attested by two sufficient witnesses, shall be of the same force to lands as to other conveyances, being legally proved within forty days, either within or without the province." (Prov. Laws, App. 7.) The earliest will upon record in the office of the Register of Wills at Philadelphia, is that of *William Clarke*, dated 12th of *May, 1681*, in Book A. page 5, which is executed in the presence of two witnesses; but the wills on record in the same book, bearing date in 1682, 1683, are generally executed in the presence of three or four witnesses.

It has been decided that since the passage of the act of 1705, it is not necessary to constitute a will, even of lands, that it should be sealed, or subscribed by witnesses, nor that the proof of the will should be made by those who subscribed as witnesses, nor that all the subscribing witnesses should prove the will. *Hight v. Wilton*, 1 Dall. Rep. 94. *Ardut v. Ardut*, 1 Serg. & Rawle, 256. It is only necessary that it should be reduced to writing, in pursuance of his direction or instructions, during the testator's lifetime, and these facts proved by two witnesses; signing by the testator, formal publication, and attestation by subscribing witnesses, being unnecessary. 16 Serg. & Rawle, 316. *Rossiter v. Simmons*, 6 Serg. & Rawle, 452. *Walmsley v. Read*, 1 Yeates, 87. But it is not necessary that the will should be read to the testator, (*Rossiter v. Simmons*, *Lewis v. Lewis*, 6 Serg. & Rawle, 489.) unless some reasonable ground be laid for considering the circumstance, that it was not read, as a badge of fraud. *Harrison v. Rowan*, 3 Wash. C. C. Rep. 580. This last mentioned decision, it is to be observed, however, was not made with reference to the act of Assembly, but upon a will of lands in *New Jersey*, where the decision took place. Of the two witnesses to a will, each must depose separately to all facts necessary to complete the chain of

signed by the testator, or some other person in his presence, and by

evidence, so that no link of it may depend upon the credibility of but one, and if the act of Assembly were out of the question, the case would be well made out by the evidence of either; and circumstantial proof cannot, therefore, be made by two or more witnesses alternating with each other, as to the different parts of the aggregate of circumstances which are necessary to make up the necessary sum of proof, the evidence of each not going to the whole. *Hock v. Hock*, 6 Serg. & Rawle, 47. *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. *Lewis v. Maris*, 1 Dall. Rep. 278. But where verbal instructions were given by A to B to draw his will, and B procured a will to be drawn by C exactly conformable to the instructions, which will B brought to the testator, who was too unwell to sign it, and died about two hours afterwards without executing it, and without having it read to him, and the testator complained to a witness on the day he died, (but whether before or after the will was brought to him does not appear by the report, though it would seem from what he said that it was before,) that he was uneasy that his will was not perfected, mentioned his earnest desire that B should draw his will, and that he had given him special instructions for that purpose, which he repeated to him, which express instructions given to B by the deceased, as related by him on the day he died, at different times of the day, were proved by two witnesses, and the testator's recognition on the day of his death, that he had given B directions to draw his will, was proved by three witnesses, it was held, in a *Nisi Prius* case, that the will drawn by C being conformable to the testator's verbal instructions, was a good will in writing under the act of Assembly of 1705. *Walmsley v. Read*, 1 Yeates, 87. One witness, therefore, according to this last mentioned case, if it be law, may prove, that the testator's will was reduced to writing by the witness's procurement, and its conformity with the instructions of the testator; and other witnesses may prove the testator's instructions as derived from himself, and their identity and conformity with the contents of the written will proved by the first witness, though the declarations of the testator, as to what the instructions for his will were, do not refer to, or recognise the fact, that to his knowledge a will had been reduced to writing in conformity with his instructions, but merely shew what his will is. Two recent decisions of the Supreme Court, however, have settled the law to be, that where one witness swears to the preparation or publication of a paper as a last will, proof by other witnesses of declarations by the testator, that he had made a will, must, in order to establish the will, be of declarations made in reference to that particular paper. *Hock v. Hock*, 6 Serg. & Rawle, 47. *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. It is said in the marginal note of *Eyster v. Young*, 3 Yeates, 511, that "though a will of lands must be proved regularly by two witnesses, yet circumstances may supply the want of one witness, where they go directly to the immediate act of disposition." This, however, is taken from a *dictum* of the Court in charging the jury, and there was no necessity in that case for having recourse to such doctrine, which is not very intelligible, for the instructions of the testator were reduced to writing, afterwards read to him in the presence of two witnesses, and were established as his will in preference to a more formal will prepared from them by the witness who had written down the testator's instructions, but which differed from them in some particulars, the witness who took the instructions having trusted for some things to his memory. The same doctrine is stated also in the marginal note of another *Nisi Prius* case, *Boudinot v. Bradford*, 2 Yeates, 170. 2 Dall. Rep. 266. The real question however involved in this case, the reports of which are very unsatisfactory, was the sanity of the testator, and his intention in destroying a will; which one witness, his nephew, who was a lawyer, and had read it to the testator a few days before his death with the view to take his instructions for preparing another will, swore was in the testator's handwriting, and which another witness, the testator's sister, swore was signed by him, though she thought the body of it was not in his handwriting. This will the last mentioned witness burned, by the testator's directions, after he had torn it in pieces; and he stated to his physician that he had destroyed it, and made use of expressions, and did certain acts evincing his determination to die intestate. In addition to the

his express directions; and be subscribed in his presence by three or four credible witnesses (a). (1)

But the actual signature of the testator in the presence of the three subscribing witnesses, is not required, if he recognise it to be his signature before them. (2) Nor is it necessary that the three subscribing witnesses should be together present, at the time of the execution. And the attestation of each witness separately is sufficient (b). (3)

"I A. B. do make this my will," is equivalent to signature, and if acknowledged before three witnesses, is a good execution within the statute (c). (4)

If the witnesses to a will attest the execution of it by the testator in an adjoining room, and the testator, from his situation, can

- (a) Vide *Ellis v. Smith*, 1 Ves. Jun. 11. *Broderick v. Broderick*, 1 P. Wms. 239. and *Stonehouse v. Evelyn*, 3 P. Wms. 254. (b) *Westbeeck v. Kennedy*, 1 Ves. & Bea. 362. (c) *Morrison v. Turnour*, 18 Ves. 183.

proof by the nephew and sister of the testator, the report of Judge *Yeates* states the determination of the testator to republish this will, and make an alteration in one of the devises, by a codicil annexed thereto, which codicil he subscribed, and published in the presence of *four* witnesses, but which he destroyed with the will to which it was annexed. The will was therefore in point of fact proved by two witnesses, and its destruction being proved by one witness who saw the fact, and another to whom the testator stated the fact, and made certain declarations evincing his intention in so doing, all these circumstances were left to the jury, who found that the destruction of the will, with the view to die intestate, did not set up a former will, as to the execution of which there was no doubt. See also *Reynolds v. Reynolds*, 16 Serg. & Rawle, 82. The words, "or by other legal proof in this province," do not mean less proof than by two witnesses, but is put in opposition to *solemn affirmation*, in order to admit the attestation of an oath. *West's Case*, before the Register General (Mr. *Chew*, afterwards Ch. Justice) in 1773, cited 1 Dall. Rep. 281. *Lewis v. Maris*, 1 Dall. Rep. 278. And notwithstanding it is stated in *Westons v. Stammers*, 1 Dall. Rep. 2, that "an exemplification of a will, made in *England*, and certified *generally* to have been proved in the Prerogative Court of *Canterbury*, under the seal of that Court, was allowed to be read in evidence," the constant understanding and practice of this state has been, that no matter where a will is made and proved, if it concern lands in *Pennsylvania*, it must be proved by two witnesses; and therefore the copy of a will of land lying in *Pennsylvania*, made in *New York*, proved before the surrogate of *New York*, by one of the subscribing witnesses, who also proved, that the other two witnesses attested the same in the presence of the testator, the copy being authenticated under the seal of the surrogate's office, and entered in the Register General's office in *Pennsylvania*, is not admissible in evidence in the Courts of *Pennsylvania*. *Hylton v. Brown*, 1 Wash. C. C. Rep. 299.

(1) *Case of Cochran's Will*, 3 Bibb's Rep. 491. *Burwell v. Corbin*, 1 Rand Rep. 131.

(2) *Lewis v. Lewis*, 6 Serg. & Rawle, 496. *Case of Cochran's Will*. *Elbeck v. Granberry*, 2 Hayw. Rep. 232.

(3) *Acc.* (in *Pennsylvania*) *Reynolds v. Reynolds*, 16 Serg. & Rawle, 85. *Wittin* in *So. Carolina*, *Sadgrove v. Sadgrove*, *Dunlap v. Dunlap*, 4 Desaus. Rep. 274 305. *Turnipsed v. Hawkins*, 1 McCord's Rep. 272. See the note to *Cruise's Digest*, vol. vi. page 65, 2d Am. edition, for the law on this subject in the several States; and the note to *Westbeeck v. Kennedy*, 1 Ves. & Bea. 362 Am. edit.

(4) *Parson v. Wightman*, 2 Rep. Const. Court, (*So. Carolina*) 313.

see them attest it, it is a good attestation within the statute. (1) But if the testator be not so situated that he can see them attest the will, it is not a good attestation thereof (*d*). (2)

The wife of an acting executor taking no beneficial interest under the will, is a competent attesting witness to prove the execution of it, within the description of a *credible* witness (*e*). (3)

And an executor clothed with a trust to pay debts, and to lay out money for the benefit of the testator's children, and with power to sell freehold lands in fee, but taking no beneficial interest under the will, is a good attesting witness to it (*f*). (4)

A will, as it respects personal property, is an indefinite disposition of all the testator may be possessed of at his death (*g*), inclusive of chattel leases, whether they were his at the time of making his will or not (*h*), and is of two species, written, or nuncupative: if of the former, it may be committed to writing either by the testator himself, or by his directions (*i*); nor is the affixing of his seal to the instrument, nor the presence of witnesses at its publication, essential to its validity; (5) yet it is safer, and more prudent, and leaves less in the breast of the ecclesiastical judge, if it be not only

- (*d*) Forrester v. Pigou, 1 Maul. & Sel. Souls' Coll; v. Codrington, 1 P. Wms. 598. Brydges v. Duch. of Chandos, 2 Tes. jun. 427.
 9. (*e*) Bettison v. Bromley, 12 East. 250. (*f*) Phipps v. Pitcher, 6 Taunt. Rep. 220. 1. Madd. Rep. 144. (*g*) Oke v. Heath, 1 Ves. 141. All
 (*h*) Wind v. Jekyl, 1 P. Wms. 575
 (*i*) Huntingdon v. Huntingdon; 2 Phill. Rep. 213. Sikes v. Snaith, *ib.* 356.

(1) *Mason v. Harrison et al.* 5 Harr. & Johns. 480.

(2) *Dunlap v. Dunlap*, 4 Desaus. 311. *Edelen v. Hardy's Lessee*, 7 Harr. & Johns. 61.

(3) *Hawley v. Brown*, 1 Root's Rep. 494.

(4) Though the general practice of the *English* Chancery, to admit a trustee as a witness, has been uniformly adopted in *Pennsylvania*, (*Drum's Lessee v. Simpson*, 6 Binn. 478.) an executor who is plaintiff in a feigned issue to try the validity of a will, is not a competent witness in support of the will, being liable for costs. *Vansant v. Boileau*, 1 Binn. 444. A devisee, not a party to the issue, who attested the will, is a good witness to prove it, if before the trial she and her husband transfer their interest, and receive a release to the husband of all actions from the transferee. *Kerns v. Seaman*, 16 Serg. & Rawle, 315. And the wife of a legatee, or the husband of a devisee, is a competent witness on the proper release being executed, though it be not accepted. *Brayfield v. Brayfield*, 3 Harr. & Johns. 208, which was the case of a nuncupative will. *Shaffer's Lessee v. Corbett*, 3 Harr. & M'Hen. 513. In *Massachusetts* an executor, who is a mere trustee, and takes no beneficial interest under the will, is an incompetent witness to prove the execution of the will, or the sanity of the testator; and the circumstance of his not being a party to the record, or not a subscribing witness to the will, makes no difference. *Durant v. Starr*, 11 Mass. Rep. 527. *Scars v. Dillingham*, 12 Mass. Rep. 358. But in *England*, in ejectment against a devisee, where the question turns upon the sanity of the testator, an executor, who takes a pecuniary interest under the will, is a competent witness to support it; inasmuch as the verdict would only have the effect of establishing the will as to the land, and would, in any proceeding to establish the will as to the personality, be treated as *res inter alios acta*. *Doc v. Tuge*, 5 Barn. & Cressw. 335.

(5) *Acc. (So. Carolina)* *White v. Holmes*, 1 M'Cord's Rep. 130

signed by the testator, but also published in the presence of witnesses (*i*).

But although the testator's seal, and the attestation to the will, and, under certain circumstances, even his signature, may be omitted, and still it may operate as an available dis[3]position of personal estate (*k*); (1) yet if, on the omission of either of those solemnities, a fair presumption may be raised of an abandonment of intention on the part of the deceased, or that his intention was merely ambulatory, the instrument shall have no effect. Thus, where the party wrote a paper purporting to be a testamentary disposition of his property, to which a clause of attestation was added, but not filled up, the court thought it reasonable, from the want of witnesses, to infer that he had changed his mind, and pronounced for an intestacy. So, where the party had merely sealed the paper propounded for a will without signing it, from the omission of the signature, the inference and decision were the same. (2) In these and the like cases, the framer of the instrument appears evidently to have contemplated a farther solemnity, as essential to its perfection; and such solemnity not having been superadded, and the instrument being left inchoate and imperfect, a change of intention may reasonably be presumed (*l*). But such presumption may be repelled by evidence, as by shewing that the party was suddenly arrested by death, or incapacitated by illness, before the instrument could be conveniently perfected (*m*), or by proving his recognition of it *in extremis*, or by circumstances shewing he intended it to operate in that form, for the presumption from such an omission that he intended doing something more; is slight, and may be repelled by slight circumstances (*n*).

By stat. 33 *Geo. 3. c. 28. § 14.* and 35 *Geo. 3. c. 14. § 16.*, it is enacted, that all persons possessed of any share or interest in the funds or any estate therein, may devise the same by will in writing, attested by two or more credible witnesses. But it has been adjudged that although the same should not be so bequeathed, yet it devolves on the executor in trust for those who are entitled to the personal estate (*o*).

With regard to nuncupative wills, the unqualified allowance of

(i) 2 Bl. Com. 501, 502. Godolph. p. 1. c. 21. s. 2. Vide *Limberg v. Mason*, Com. Rep. 451. and see *Walker v. Walker*, 1 Meri. Rep. 503.

(m) *Baillie v. Mitchell*, in Prerog. Court, 1805.

(k) *Read v. Phillips*, 2 Phill. Rep. 122. (n) *Harris v. Bedford*, 2 Phill. Rep. 177.

(l) *Mathews v. Warner*, 4 Ves. jun. 136. and 5 Ves. jun. 23. *Griffin's case*, cited in *Mathews v. Warner*, and in *ex parte Fearon*, 5 Ves. jun. 644. and *Giles v. Trecothick*, 9 Ves. jun. 249. (o) *Ripley v. Waterworth*, 7 Ves. jun. 452.

(1) *Bevan's Ex. v. Tilden*, 5 Harr. & Johns. 371

(2) *Tilghman v. Stuart*, 4 Harr. & Johns. 155. *Case of A. Stewart's Will*, (cited) 4 Harr. & Johns. 169. See *Witherpoole's Heirs v. Witherpoole's Exrs* 1 McCord, 570

them was found productive of the greatest frauds, [4] and it became necessary to subject them to very strict regulations. Accordingly by the stat. 29 *Car.* 2. above-mentioned, it is enacted, that no such will shall be good, (1) where the estate thereby bequeathed shall exceed the value of thirty pounds, (2) that is not proved by the oaths of three witnesses at the least, who were present at the making thereof (who, by stat. 4 & 5 *Ann. c.* 16., must be such as are admissible on trials at common law), (3) nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; (4) nor, unless such nuncupative will were made in the time of the last sickness of the deceased, and in his dwelling-house, or where he had been resident for the space of ten days or more, next before the making of such will, except where such person was taken sick from home, and died before his return; nor, after six months past after the speaking of the pretended testamentary words, shall any testimony be received to prove any will

(1) In *Pennsylvania*. by the 3d and 4th sections of the act of 1705, which are almost transcripts from the stat. 29 *Car.* 2. (*Purd. Dig.* 801. 1 *Dall. Laws*, 53. 1 *Sm. Laws*, 33.) "No nuncupative will [shall] be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by two or more witnesses, who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will be made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days or more, next before the making of such will, except where such person was surprised or taken sick, being from his own house, and died before he returned to the place of his or her dwelling."

"After six months past, after speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after making of the said will."

And by the 5th section, "No letters testamentary or probate of any nuncupative will, shall pass the seal of the Register general's office, in the respective counties of this province, till fourteen days, at the least, after the death of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process shall have first issued to call in the widow or next of kindred to the deceased, to the end that they may contest the same, if they please."

(2) *Weeden v. Bartlett*, 6 *Munf.* 123. Thirty dollars is the amount in Virginia. The amount of property in the case of *Brayfield v. Brayfield*, 3 *Harr. & Johns.* 208, where the nuncupative will was regularly proved, was 3236 Dollars 48 cents.

(3) A legatee who releases his interest is admissible, though the release be not accepted. *Brayfield v. Brayfield*, 3 *Harr. & Johns.* 208. A free negro is incompetent in *South Carolina* in any case where the rights of white persons are concerned. *White v. Helmes*, 1 *M'Cord*, 430.

(4) *Bennett v. Jackson*, 2 *Phill. Rep.* 190. *M'Gee v. M'Cants*, 1 *M'Cord*, 518. See *Mason v. Dunman*, 1 *Munf.* 456, where notes dictated *animo testandi* to a person by the decedent, with the view to have a written will prepared, were established (in *Virginia*) as a good nuncupative will, though a written one was prepared from them, which the testator was unable to execute, being delirious. The *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in addition to all the several requisites to its validity, under the statute of frauds, being proved, to entitle it to probate. *Le-mann v. Bonsall*, 1 *Addam's Rep.* 389.

nuncupative, except the testimony, or the substance thereof, were committed to writing within six days after the making of the said will (*o*).

Soldiers in actual military service, and mariners, or seamen at sea, are exempted from the provisions of this act.⁽¹⁾ The former may at this day make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases (*p*).

[5] But, with respect to the latter, this licence no longer exists. The perpetual impositions practised on this meritorious and unsuspecting body of men induced the legislature to adopt a new policy, and to divest them of a privilege, which, instead of being beneficial to them, was perverted to purposes the most injurious.

Many salutary regulations were accordingly prescribed by the statutes 26 *Geo. 3. c. 63.*, 32 *Geo. 3. c. 34.*, and 49 *Geo. 3. c. 108.*, in regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commissioned officers of marines, and marines serving on board a ship in the king's service, since however repealed, and other regulations substituted by the statute 55 *Geo. 3. c. 60*, but which I shall defer specifying till I treat of probates.

A codicil is a supplement to a will, annexed to it by the testator, and to be taken as part of the same, either for the purpose of explaining, or altering, or of adding to, or subtracting from, his former dispositions (*q*).

A codicil may be annexed to the will, either actually or constructively. It may not only be written on the same paper, affixed to, or folded up with the will, but may be written on a different paper, and deposited in a different place.

A codicil may be annexed either to a devise of lands, or to a will of personal estate. To alter the former a codicil [6] must by the statute of frauds be in writing, and signed by the deviser, or some other person in his presence, and by his express directions, and be subscribed in his presence by three or four credible witnesses (*r*). To a will of personal estate it may be either written or nuncupative, provided in case of its being the latter, it merely supply an omission in the instrument. Therefore A. having disposed of part of his effects by his will in writing, may dispose of the residue by a nuncupative codicil (*s*). But by the same statute, as

(*o*) See *Miller v. Miller*, 3 P. Wms. 356.

(*p*) 1 Bl. Com. 417. Stat. 29 Car. 2. c. 3. s. 23. 5 W. 3. c. 21. s. 6.

(*q*) 2 Bl. Com. 500. Swinb. Part 1. s. 5.

(*r*) *Onions v. Tyrer*, 1 P. Wms. 344. & note 1. *ibid.* vid. Dougl. 244. note 2.

Ellis v. Smith, 1 Ves. jun. 11, and *infr.* 15.

(*s*) Com. Dig. Devise (C.) Raym. 334.

(1) "*Provided always*, that notwithstanding this act, any mariner or person being at sea, or soldier being in actual military service, may dispose of his moveables, wages and personal estate, as he or they might have done before this act." Act of 1705, sect. 7. Purl. Dig. 801. 1 Dall. Laws, 53. 1 Sm. Laws, 33.

we shall presently see, such codicil shall not operate to repeal, or alter a will. A written codicil respecting personal estate is authenticated in the same manner as a will of such property.

In respect to copyholds, they are not within the statute of frauds. A devise of them operates only as a declaration of uses on the surrender to the use of the will: if, therefore, the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, be observed, it is sufficient without any witness; and till that statute required all declarations of trusts to be in writing, even a nuncupative will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form (*t*).

[7] But a devise of customary freeholds, where there is no custom to surrender to the use of the will, must be pursuant to the statute (*u*).

An estate pur autre vie, being freehold, will pass by such a will only as is so executed (*v*).

In regard to terms for years, as they fall within the description of personal estate, (1) they may be disposed of by will accordingly, with this distinction; If they are terms not in gross, but vested in trustees to attend the inheritance, they so partake of its nature, that if the owner devise the land generally, the trust of the term will not pass, unless the will be so attested as to pass the inheritance (*w*). If they are terms in gross of which the testator is possessed, he may transmit them by the same kind of will as any other personalty; yet he cannot create them by will without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is real property, and the creation of the term is a partial devise of it (*x*).

If a will give a sum of money originally, and primarily out of land, the instrument is considered as a devise of real estate, and must be executed with the same solemnities, because the charge is regarded in equity as part of the land, since it can be raised only by sale, or disposition of part of it (*y*).

[8] Although money covenanted to be laid out in land shall descend as a real estate, and may be devised accordingly, yet he,

(*t*) Harg. Co. Litt. 114 b. note 3. Tuffnell v. Page, 2 Atk. 37. S. C. 2 Barnard, Ch. Rep. 9. Attorney-General v. Barnes, 2 Vern. 598. Dorner v. Thurland, 2 P. Wms. 510. Harris v. Ingledeu, 3 P. Wms. 96. Carey v. Askew, 2 Bro. Ch. Rep. 58. Church v. Mundy, 12 Ves. jun. 429.

(*u*) Warde v. Warde, Amb. 299.

(*v*) See Watk. Princ. Convey. 22.

and Stat. 29 Car. 2. c. 3. s. 12. and 14 Geo. 2. c. 20.

(*w*) Harg. Co. Litt. 114 b. note 3. Whitchurch v. Whitchurch, Gilb. Ca. in Eq. 168. S. C. 2 P. Wms. 236. S. C. 9 Mod. 127. Villiers v. Villiers, 2 Atk. 72. Goodright v. Sales, 2 Wils. 329. Vid. infr.

(*x*) Harg. Co. Lit. 114 b. note 3.

(*y*) Brudenell v. Boughton, 2 Atk. 272.

(1) *Ex parte Gay*, 5 Mass. Rep. 419. *Chapman v. Gray*, 15 Mass. Rep. 439.

Montague v. Smith, 13 Mass. Rep. 396. *Brewster v. Hill*, 1 New Hamp. Rep. 350.

who is entitled to the fee of the land when purchased, may dispose of it as personal property, under the description of so much money to be laid out in land, by a will which is not attested by three witnesses (*z*).

The statute of frauds has been held not to be applicable to the case of a devise of land in Barbadoes (*a*), because acts of parliament passed in England without naming the foreign plantations will not bind them.

A will may be void from the incapacity of the party making it; and secondly, it may be annulled by cancelling, or revoking it (*b*).

There are three grounds of incapacity; the want of sufficient legal discretion; the want of liberty or free will; and the criminal conduct of the party (*c*). (1)

To the first are subject, by the express provision of the stat. 34 & 35 *Hen. 8 c. 5*. all infants under the age of twenty-one years in regard to lands (*d*). (2) In respect to personal estate, infants under the age of fourteen years, if males, (3) and of twelve years, if females, are incompetent to bequeath the same (*e*): After that period their incapacity ceases: although, on the one hand it has been strangely asserted, that an infant of any age, even of four years old, may make a testament of per[9]sonal property (*f*); and on the other, he has been denied before eighteen, to be competent (*g*); yet this, as a matter of ecclesiastical cognizance, must be determined by the ecclesiastical law, which has prescribed the rule as above stated (*h*).

But, if the testator, of whatever age, were not of sufficient capacity, that will invalidate his testament. By the above-mentioned statute of the 34th and 35th *Hen. 8*. a will of lands made by an idiot, or by any person of nonsane memory, is declared void. Persons afflicted with madness, or any other mental disability, idi-

(*z*) *Lingen v. Sowray*, 1 P. Wms. 172. 291. *Edwards v. Countess of Warwick*, 2 P. Wms. 171. S. C. 3 P. Wms. 221. note. S. C. 2 Eq. Ca. Abr. 298.

(*a*) *Anon.* 2 P. Wms. 75.

(*b*) 2 Bl. Com. 502.

(*c*) 2 Bl. Com. 496, 497.

(*d*) *Herbert v. Torball*, 1 Sid. 162. Stat. 34 & 35 H. 8. c. 5, s. 14.

(*e*) Off. Ex. 213, 214. Harg. Co. Litt. 89 b. note 6.

(*f*) *Perkins*, s. 503; but that seems an error of the press for 14. Vide Harg. Co. Litt. 89 b. note 6.

(*g*) Harg. Co. Litt. 89 b.

(*h*) 2 Bl. Com. 497. Harg. Co. Litt. 89 b. note 6.

(1) 4 Greenl. Rep. 223. *Dietrick v. Dietrick*, 5 Serg. & Rawle, 207. *Nussear v. Arnold*, 13 Serg. & Rawle, 323. But any one has a right by fair argument and persuasion, or by virtuous influence, to induce another to make a will in his favour. *Miller v. Miller*, 3 Serg. & Rawle, 267. *Small v. Small*, 4 Greenl. Rep. 220.

(2) Although the Act of Assembly (of 1705) does not mention the common law disabilities, of coverture, infancy, idocy, &c., yet these disqualifications exist in *Pennsylvania* as well as in England. *West v. West*, 10 Serg. & Rawle, 446.

(3) *Dean, Ex. v. Litthfield*, 1 Pick. Rep. 239. In *North Carolina*, an infant under the age of eighteen years cannot dispose of his personal estate by will. *Williams v. Baker*, 2 Car. Law Rep. 599.

ots, (1) or natural fools, or those whose intellects are destroyed by age, (2) distemper, or drunkenness, (3) are all incapable of making a will of personal estate, during the existence of such disability. In this class also may be ranked those persons, who, having been born deaf, and blind, have ever wanted the common sources of understanding (*i*). But a will is not affected by the subsequent insanity of the testator (*k*). (4) And if a testator be subject to insanity, a will made during a clear lucid interval will be established (*l*). (5)

In respect to the incapacity arising from the want of liberty, or freedom of will, prisoners, captives, and the like, are not by the law of England absolutely disabled to make a testament; but the court has a discretion of judging, whether from the special circumstances of duress, such act shall be construed involuntary.

A married woman is also precluded, by the aforesaid stat. 34 and 35 *Hen.* 8. from devising lands. (6) Nor has she the [10] power of bequeathing personal estate. Her personal chattels belong absolutely to the husband. He may also dispose of her chattels real, and he shall have them to himself in case he survive; an interest which necessarily precludes her from such an alienation (*m*): yet by the licence of the husband, (7) she may make a testament,

(*i*) 2 Bl. Com. 497.

(*k*) 4 Co. 60.

(*l*) *Clerke v. Cartwright*, 1 Phill. Rep. 90. *White v. Driver*, ib. 84. 1

Dow's Rep. 178.

(*m*) 2 Bl. Com. 497, 498. 4 Co. 51.

34 & 35 *Hen.* 8. c. 5. s. 14.

(1) See *Rambler v. Tryon*, 7 Serg. & Rawl. 90. Mere feebleness of intellect, short of what might by many be supposed to amount to idiocy, is insufficient to render a will void. *Dornick v. Reichenback*, 10 Serg. & Rawl. 84. *Heister v. Lynch*, 1 Yeates, 108.

(2) But extreme old age does not of itself disqualify a person from making a will. *Van Alst v. Hunter*, 5 Johns. Cha. Rep. 158, in which case the testator was between 90 and 100 years old.

(3) But drunkenness merely of itself is no legal exception to the validity of a will; but where a man's senses are besotted by habitual intoxication, and his understanding gone, he can make no will. *Stand v. Douglas*, 2 Yeates, 48. *Hight v. Wilson*, 1 Dall. 94—the facts of the case. *Temple v. Temple*, 1 Hen. & Munf. 476. In *Pennsylvania*, the Act of 25th Feb. 1819, relative to habitual drunkards, provides, that like proceedings shall be had to determine whether a person be an habitual drunkard as in the cases of persons *non compos mentis*, and upon the return of an inquisition finding that a person by reason of habitual drunkenness has become incapable of managing his estate, the Court of Common Pleas shall appoint two guardians or trustees, who shall have the care and management of his estate, and apply so much of the same as shall be necessary to his maintenance and that of his family. (Purd. Dig. 190.) No case, it is believed, has occurred, in which the effect of such an inquisition, upon the right of the habitual drunkard to make a will, has been determined.

(4) *Hughes v. Hughes's Ex.* 2 Munf. 209.

(5) And if a person who has been placed under guardianship as *non compos mentis*, be restored to his reason, he is capable of making a will, although the letters of guardianship remain unrevoked. *Stone v. Damon*, 12 Mass. Rep. 488.

(6) See *Ante*, p. 8, note (2) Cooper's Justinian, 494.

(7) *Osgood v. Bred*, 12 Mass. Rep. 537. The testament being in the husband's

and, on marriage, he frequently covenants with her friends to allow her that privilege (*n*). So, where he stipulates that personal property shall be enjoyed by the wife separately, it must be so enjoyed with all its incidents, one of which is the power of disposition by a testamentary instrument (*o*). (1) And where she has such power over the principal, it extends also to its produce and accretions (*p*). (2)

But where a feme covert, in consequence of such a contract on the part of the husband, makes a writing in the nature of a will, it seems not in a strict legal sense to operate as a will, but as an appointment; yet it is so far testamentary, that it must be proved in the spiritual court, before her legatee shall be entitled (*q*). (3)

If the husband be banished for life by act of parliament, the wife is entitled to make a will (*r*). (4) So where personal [11] property is given in trust for the sole and separate use of a married woman, she may dispose of it by will, without her husband's assent (*s*).

A feme covert may also make a will of effects, of which she is in possession in *autre droit*, in a representative capacity; for they never can be the property of the husband (*t*).

The queen consort has a general right to dispose of her personal estate by will, without the consent of her lord (*u*).

Persons incompetent by their crimes are all traitors, and felons without benefit of clergy, from the time of their conviction and attainder, or outlawry, which amounts to the same; for then their property is no longer at their own disposal, but is altogether forfeited (*v*).

(*n*) Dr. & Stud. D. l. c. 7. 4 Bac. Abr. 244. Vide *Rex v. Bettesworth*, Stra. 891.

(*o*) 4 Bac. Abr. 244. in note. Fettiplace v. Gorges, 3 Bro. Ch. Rep. 8. S. C. 1 Ves. jun. 46.

(*p*) *Gore v. Knight*, 2 Vern. 535. *Herbert v. Herbert*, Pree. Ch. 44. 355.

(*q*) *Ross v. Ewer*, 3 Atk. 156. *Jenkin v. Whitehouse*, 1 Burr. 431. *Cotthay v. Sydenham*, 2 Bro. Ch. Rep. 392. *Stone v. Forsyth*, Dougl. 707. Vide also *Cotter v. Laver*, 2 P. Wms. 624. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 75. *Southby v. Stonehouse*,

ib. 612. 2 Bl. Com. 498. *Rex v. Bettesworth*, Stra. 891.

(*r*) 4 Bac. Abr. 244. *Countess of Portland v. Progers*, 2 Vern. 104.

(*s*) *Fettiplace v. Gorges*, 3 Bro. Ch. Rep. 8. S. C. 1 Ves. jun. 46. *Tappenden v. Walsh*, 1 Phill. Rep. 352.

(*t*) Off. Ex. 87. *Godolph. l. 10, 11. Vin Abr. 141.*

(*u*) *Harg. Co. Litt. 133.*

(*v*) 2 Bl. Com. 499. 4 Bl. Com. 380, 381. 387. *Bac. Abr. tit. Outlawry. 2 Hale, P. C. 205. Godolph. p. 1. c. 12. s. 8.*

handwriting is evidence of his assent. *Grimke v. Grimke*, 1 Desaus. Rep. 366 But in the absence of any stipulation or agreement, made between them, that her personal property shall be held or enjoyed by the wife to her separate use, a testamentary disposition by a *feme covert* of her personal property or *choses in action* in favour of her husband, is void, though made with his consent. *Hood v. Archer*, 1 McCord's Rep. 225. 177. *Case of Sarah, A. Newell*, 2 McCord's Rep. 453

(1) 1 McCord's Rep. 226. 1 Veates, 225.

(2) 1 McCord's Rep. 226.

(3) 4 Mason's Rep. 461, 462.

(4) *Wright v. Wright*, 2 Desaus. Rep. 411.

In case a traitor, or felon without benefit of clergy, shall die after conviction, and before attainder, his lands shall pass by his will, but not his goods and chattels; for the former are forfeited only on attainder, the latter on conviction (*w*). (1)

Nor shall the will of a *felo de se*, so far as it respects goods and chattels, have any operation; for they are forfeited by [12] the act and manner of his death; but a devise of his lands shall be effectual, for of them no forfeiture is incurred (*x*). As is also that of a party guilty of felony, not punishable with death, for he forfeits only his goods and chattels (*y*). And a felon of every description may devise lands held in gavelkind; for lands of this tenure are not forfeited by felony (*z*).

Outlaws also, though merely in civil cases, are intestable, in respect to their personal property, while their outlawry subsists; for their goods and chattels are forfeited during that time (*a*).

As for persons, guilty of other crimes inferior to felony, as usurers, and libellers, they are not precluded from making testaments (*b*); nor, as it seems, is a party excommunicated (*c*).

An alien, with whose country we are at war, if he have not the king's licence to reside here, express, or implied, is, by our law, incapable of making a will; but if he have such licence, he, as well as an alien friend, may bequeath his personal estate (*d*). (2) They

(*w*) 4 Bl. Com. 387.

Paine v. Teap, 1 Salk. 109. Sed vid

(*x*) Plowd. 261. Swinb. 106. 4 Bac. Abr. 247. 4 Bl. Com. 386. 3 Inst. 55.

Shaw v. Cutteris, Cro. Eliz. 851.

(*y*) 4 Bl. Com. 97. Co. Litt. 391.

(*b*) Godolph. p. 1. c. 12.

(*z*) 2 Bl. Com. 84. 4 Bl. Com. 386.

(*c*) Off. Ex. 17.

Lamb. Peramb. 634.

(*d*) 1 Bl. Com. 372. Wells v. Williams, 1 Lutw. 34. 1 Wooddes. 374.

(*a*) Fitzh. Abr. tit. Descent, 16.

(1) By the 19th section of the 19th article of the Constitution of the state of *Pennsylvania*, it is provided, "that no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth; the estates of such persons as shall destroy their own lives shall descend or vest as in case of natural death, &c."

(2) By the 3d section of the Act of 23d Feb. 1791, entitled "a supplement to the act entitled 'an act to declare and regulate oaths,'" it is provided that "all such persons [citizens or subjects of foreign states] shall be able and capable in law to dispose of any goods and effects to which they may be entitled within this state, either by testament, donation or otherwise," &c. (Purd. Dig. 8. 3 Dall. Laws, 8. 3 Sm. Laws, 4.) Acts of assembly have been passed at different periods giving to aliens in *Pennsylvania* a more or less restricted right to acquire land, and to dispose of it by deed or will, (Act of 31 Aug. 1778, Purd. Dig. 7. 1 Dall. Laws. 774. 1 Sm. Laws, 461; Act of 23d Feb. 1791; 10th Feb. 1807, Purd. Dig. 8. 4 Sm. Laws. 362; Act of 20th March 1811, Purd. Dig. 9. 5 Sm. Laws, 211; Act of 22d March 1814, Purd. Dig. 9. 1 Reed's Laws, 178;) and by the act of the 24th March 1818 (Purd. Dig. 9. 2 Reed's Laws, 133,) sect. 1. it is provided that "from and after the passing of this act, it shall and may be lawful for all and every foreigner and foreigners, alien or aliens, not being the subject or subjects of some foreign state or power, which is or shall be at the time or times of such purchase or purchases, at war with the United States of America, to purchase lands, tenements, and hereditaments, within this Commonwealth, not exceeding five thousand acres, and to have and to hold the same to them, their heirs and assigns, for ever, as fully to all intents and purposes as any natural born citizen or citizens may or can do."

can neither of them acquire any permanent property in land. They may, indeed, hire, or take leases for years of houses for habitation (e), which chattel [13] interests, it seems, they may dispose of by will (f): But the stat. 32 *Hen. 3. c. 6. s. 13.* makes void all leases of houses or shops to an alien artificer, or handicraftsman. And this law, however contrary it may appear to sound policy, and the spirit of commerce, is still in force; but in favour of aliens it has been construed very strictly (g).

By stat. 5 *Geo. 1. c. 27.*, British artificers going out of the realm to exercise, or teach their trades abroad, or exercising their trades in foreign parts, who shall not return within six months, after due warning given them, shall be deemed aliens, and incapable of taking any lands, and shall forfeit all their real and personal estates; consequently, their wills can have no operation here.

Secondly, a will of personal estate, and by the statute of frauds a will of lands, may be annulled by burning, cancelling, tearing, or obliterating the same, by the testator, (1) or in his presence, and by his direction and consent (h). And a will of either species may be annulled by an express, or implied revocation of it.

Although a testator has made a will irrevocable in the strongest terms, yet he is at liberty to revoke it; for he shall [14] not, by his own act or expressions, alter the disposition of law, so as to make that irrevocable, which is of an opposite nature (i). (2)

With respect to the revocation of a will by the act of cancelling, it is in itself an equivocal act; and in order to make it a revocation, it must be shewn *quo animo* it was cancelled; for, unless that appear, it will be no revocation. (3) As, if A. were to throw the ink upon his will instead of the sand, although it might be a complete defacing of the instrument, it would be no cancellation:

(e) 1 Bl. Com. 371, 372. 7 Co. Rep. 17. Harg. Co. Litt. 2 b.

(f) Harg. Co. Litt. 2 b. note 8.

Harg. Co. Litt. 1 Anders. 25. N. Bendl. 36. vid.

also, Caroon's case, Cro. Car. 8. Sed vid. Co. Litt. 2 b.

(g) Harg. Co. Litt. 2 b. note 7.

vid. Jevons v. Harridge, 1 Sid. 309 Jevons v. Livemere, 1 Saund. 7. Pilkington v. Peach, 2 Show. 135. Bridgman v. Frontee, 3 Mod. 94. Wells v. Williams, 1 Salk. 46.

(h) Stat. 29 Car. 2. c. 3. s. 6.

(i) 8 Co. 82.

(1) *Johnson v. Brailsford*, 2 Nott & M'Cord, 272. The word "destroying" is used in the Act of Assembly (of *South Carolina*) instead of the words "burning, cancelling, and tearing" in the statute of frauds; but the construction is the same. In *Pennsylvania*, implied, constructive, or legal revocations, among which are cancelling, obliterating, or destroying the will, still subsist as they were before the Act of Assembly (of 1765) or the statute of frauds, *Lawson v. Morrison*, 2 Dall. Rep. 289.; and the Act of Assembly being silent as to such revocations in law, they may be proved as other matters of fact, without regard to the form prescribed by the act for the probate of a will, *Burns v. Burns*, 4 Serg. & Rawle, 297.

(2) See *Matter of Nan Mickle*, 11 Johns. Rep. 324. The case of an implied revocation.

(3) 2 Yeates, 171. 7 Johns. Rep. 529. *Semmes v. Semmes*, 7 Harr. & Johns. 389.

or, suppose A., having two wills of different dates in his possession, should direct B. to cancel the former, and through mistake he should cancel the latter; such an act would be no revocation of the last will: or, suppose A. having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part (*k*): (1) or if A. upon a supposition that he had executed a second will, according to the statute of frauds, containing devises of the real estate precisely the same as those in the first, and to the same person, cancel such former will, the devises shall not be revoked, since the cancelling was upon an evident mistake (*l*). (2) And where a testator being angry with one of the devisees in his will, began to tear it with the intention of destroying it; and having torn it into four pieces was prevented from proceeding further, partly by the efforts of a by-stander, who seized his arms, and partly by the intreaties of the devisee, and upon that became calm; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse; upon the facts, the verdict of a jury in favour of the will, was supported (*m*). (3) It is the intention, therefore, that must govern in such cases, and parol evidence is admissible to explain it (*n*). (4)

If a will be destroyed during the lifetime of the testator, but without his knowledge, it will be substantiated upon satisfactory proof thereof, and of its contents (*o*). (5)

[15] In case there be duplicates of a will, one in the custody of the testator, the other not; and the testator, with an intention to revoke his will, cancels that which is in his custody, it is an effectual cancellation of both (*p*).

So a will may be only partially cancelled: therefore, if A. devise two estates, Black Acre to B. and White Acre to C., and, after the execution of such will, expunges that part which relates to

(*k*) *Hyde v. Hyde*, 1 Eq. Ca. Abr. 409. 3 Cha. Rep. 155. S. C. *Burtenshaw v. Gilbert*, Cowp. 49. 8 Vin. Abr. 146. pl. 17.

(*l*) *Onions v. Tyrer*, 1 P. Wms. 343. 345. *Burtenshaw v. Gilbert*, Cowp. 52.

(*m*) *Perkes v. Perkes*, 3 Barn. & Ald. 489.

(*n*) *Burtenshaw v. Gilbert*, Cowp. 53.

(*o*) *Trevelyan v. Trevelyan*, 1 Phill. Rep. 149.

(*p*) *Burtenshaw v. Gilbert*, Cowp. 54. *Onions v. Tyrer*, 1 P. Wms. 346. S. C. 2 Vern. 742. *Mason v. Limberry*, 4 Burr. 2515. S. C. Com. Rep. 451. *Rickards v. Munford*, 2 Phill. Rep. 123.

(1) *Burns v. Burns*, 4 Serg. & Rawle, 295.

(2) *Semmes v. Semmes*, 7 Harr. & Johns. 388.

(3) See *Giles's Heirs v. Giles's Ex.* Cam. & Norw. Rep. 174.

(4) *Burns v. Burns*, 4 Serg. & Rawle, 295. *Harvard v. Davis*, 2 Binn. 406. *Giles's Heirs v. Giles's Ex.* *Boudinot v. Bradford*, 2 Yeates, 170. *Bates v. Holman*, 3 Hen. & Munf. 502.

(5) 2 Yeates, 171. Or lost, *Legare v. Ash*, 1 Bay, 464.: and an issue will be directed, on satisfactory proof adduced, to try whether a will said to be lost, was ever in fact executed, and what were its provisions. *Brent v. Dodd*, Gilm. Rep. 211.

the disposition of White Acre, the devise of Black Acre shall not be revoked by such obliteration (*p*). (1)

A residuary bequest was held to be cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin, indicating alteration and a different disposition of certain articles (*q*). (2)

Alterations in pencil of a will, are not therefore to be taken as merely deliberative, but are to be considered as equally valid as if made in ink, provided it appear that the deceased intended them to take effect (*r*). (3)

A will may be expressly revoked by another will, or by a codicil in writing; either of which, in case it relate to land, must be executed pursuant to the statute of frauds as above stated. Such will of lands may be also revoked by writing other than a will, or codicil; and then such other writing must by the statute be signed by the deviser, in the presence of three or four witnesses declaring the same. The requisition in the statute of the signature by the deviser to such revocation in the presence of three or four witnesses declaring the same, is, according to the sound construction of the statute, applicable merely to such other writing, and not to a will, or codicil of revocation; since the legislature could not intend to require that a will or codicil amounting to a revo[16]cation should be executed in one mode, and a will or codicil originally disposing of lands should be executed in another (*s*).

These provisions of the statute in regard to revocation do not extend to personal estate. A will of personal estate may be revoked by another will, or by a codicil, or other writing authenticated in the same manner as a will of such property (*t*). But by the same statute (4) no will in writing of personal estate shall be repealed, or altered by parol, or will nuncupative, unless the same be committed to writing in the testator's life, and afterwards read to, and allowed by him, and proved so to be by three witnesses at the least (*u*). (5)

(*p*) See *Sutton v. Sutton*, Cowp. 812. and *Winsor v. Pratt*, 2 Brod. & Bing. 650.

(*q*) *Mence v. Mence*, 18 Ves. jun. 348.

(*r*) *Dickenson v. Dickenson*, 2 Phill. Rep. 173.

(*s*) *Ellis v. Smith*, 1 Ves. jun. 11.

(*t*) *Vid. Brady v. Cubitt*, Dougl. 35. *Doe v. Pott*, ib. 690. n. 2. *Onions v. Tyrer*, 1 P. Wms. 543. *Ellis v. Smith*, 1 Ves. jun. 11.

(*u*) *Vid. infr.*

(1) *Pringle v. Macpherson's Ex.* 2 Desaus. Rep. 524. *Jackson v. Holloway*, 7 Johns. Rep. 394.

(2) See *Cogbill v. Cogbill*, 2 Hen. & Munf. 467.

(3) Such alterations, however, are more equivocal as to intention, as persons are apt to make pencil marks for memoranda. *Purkin v. Bainbridge*, 3 Phill. Rep. 322.

(4) The 6th section of the act of 1705, is copied *verbatim* from the 12th section of the statute of frauds, with the exception of the number of witnesses required. By the act of assembly the witnesses are to be "two or more." *Purd Dig* 801. 1 Dall. Laws, 53. 1 Sm. Laws, 33.

(5) *Moritz v. Brough*, 16 Serg. & Rawle, 403. The provisions of the act

Devises of customary freeholds, or of terms vested in trustees to attend the inheritance, or of sums of money primarily charged on lands, must, as we have seen, be executed pursuant to the solemnities required by the statute, and, consequently, fall within its provisions in regard to revocation (*t*).

If a testator, in consequence of fraud, or misinformation, or mistake in regard to a fact, as, for example, the death of a devisee, or legatee, who is living, make a new will, the former instrument shall not be revoked by the latter (*u*). (1)

[17] It is essential that the second will should expressly revoke, or be clearly inconsistent with the first, in respect to the subject matter of such will; for no subsequent disposition shall revoke a prior, unless it apply to the same subject (*v*). It is also necessary that the second will should be subsisting and effective at the time of the testator's death; if, therefore, in case of a devise of lands, it be not executed according to the statute of frauds, it is not effective, and is as if no second will had existed (*w*). (2) So, if the second will be effectually cancelled in the lifetime of the testator, the first will shall operate as if no other had existed; for it is the only will subsisting at the testator's death (*x*). But the particular circumstances of the cancellation and the case must be looked to, for in a late case where a second will was mutilated so as to amount to a cancellation, such cancellation was held not to revive the prior will of nearly similar import (*y*).

In case a party leave two inconsistent wills of the same date, neither of which can be proved to have been last executed unless explained by some act of the testator, they are both void for uncertainty, and will let in the heir (*z*).

The making of a subsequent codicil does not invalidate the former, unless it appear to be so intended. Codicils, however nu-

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| (<i>t</i>) <i>Brudenell v. Boughton</i> , 2 Atk. 72. | <i>Limbery v. Mason</i> , Com. Rep. 451. |
| (<i>u</i>) <i>Campbell v. French</i> , 3 Ves. jun. 321. | (<i>x</i>) <i>Goodright v. Glazier</i> , 4 Burr. 2512. |
| (<i>v</i>) <i>Onions v. Tyrer</i> , 1 P. Wms. 345. in note. <i>Harwood v. Goodwright</i> , Cowp. 87. S. C. 7 Bro. P. C. 344. | (<i>y</i>) <i>Moore v. Moore</i> , 1 Phill. Rep. 375 and 406. |
| (<i>w</i>) <i>Hyde v. Hyde</i> , 3 Ch. Rep. 155. | (<i>z</i>) <i>Phipps v. Earl of Anglesea</i> , 5 Bro. P. C. 45. <i>Onions v. Tyrer</i> , 1 P. Wms. 344. note 1. |

extend to wills of *land*, which must be revoked by writing, accompanied with the same solemnities as a will of personal estate. *Lawson v. Morrison*, 2 Dall. Rep. 289. *Boudinot v. Bradford*, 2 Yeates, 170. But the *parol* republication of a former will in writing will revoke a will of lands. *Harvard v. Davis*, 2 Binn. 406.

(1) Though a devisee who by force or fraud prevents a testator from cancelling his will becomes a trustee for those who would be entitled to the property in case the revocation had taken place, the will is not thereby revoked. *Gains v. Gains*, 2 Marsh. Rep. (*Kentucky*) 190.

(2) *Taylor v. Taylor*, 2 Nott & M'Cord, 435. (*So. Carolina.*) *Reid et ux. v. Borland*, 14 Mass. Rep. 208. *Bell v. Bell*, 1 Harr. & M'Hen. 409.

merous, may be all effectual (*a*). But a codicil may be virtually revoked by another codicil of a subsequent date, although there are no express words of revocation in the latter instrument (*b*).

[18] There are also other species of revocations which I have not mentioned. The statute of frauds extends not to implied revocations, or to such as are in the nature of adempments.

With respect to implied revocations, they depend altogether on the supposed intention of the party. The law will presume such intention, and allow it to prevail, in case the circumstances of the testator's situation be materially altered. Hence, if, after the making of his will, he marry, and have a child, this is a constructive revocation of the will which he made in a state of celibacy (*c*); (1) so marriage, and the birth of a posthumous child, afford the same inference; or rather in such cases a tacit condition is annexed to the will at the time of making it, that the party did not then intend that it should take effect, if a total change should happen in the situation of the family (*d*). But the presumption, like all others, may be rebutted by every sort of evidence (*e*). (2)

Yet it seems there is no case in which marriage and the birth of a child have been held to raise an implied revocation, unless there has been a total disposition of the whole estate. (3) In cases of per-

(*a*) *Swinb. Part 1. s. 5. Hitchins v. Sprague v. Stone, Ambl. 721. and vid. Basset, 1 Show. 549. Willet v. Sand- Christopher v. Christopher, 4 Burr. 2182. note.*

(*b*) *Methuen v. Methuen, 2 Phill. (d) Lancashire v. Lancashire, 5 Term Rep. 49.*

(*c*) *Lugg v. Lugg, Ld. Raym. 441. (e) Brady v. Cubitt, Dougl. 31. See Cook v. Oakley, 1 P. Wms. 304. 1 P. Wms. 304. note 4.*

(1) *Per M'KEAN C. J., in Lawson v. Morrison, 2 Dall. Rep. 289, decided in 1792. Wilcox v. Rootes, 1 Wash. Rep. 140. See a case mentioned by Carrington, J. 3 Call's Rep. 341. Brush v. Wilkins, 4 Johns. Cha. Rep. 506.*

(2) *Brush v. Wilkins.* The presumption, however, (the strength of which varies according to circumstances,) may be rebutted by evidence (strong in proportion) to show that the testator *meant* it to operate notwithstanding his marriage, and the birth of issue; but such evidence to be effectual, must satisfy the Court *unequivocally*. *Gibbons v. Cross, 2 Addam's Rep. 455. In Pennsylvania it is provided by the 23d section of the act of 19th April 1794, "that where any person, from and after the passing of this act, shall make his or her last will and testament, and shall afterwards marry or have a child or children not provided for in any such will, and die leaving a widow and child, or either widow or child, although such child or children be born after the death of their father, every such person so far as shall regard the widow, or child, or children after born, shall be deemed and construed to die intestate, and such child or children shall be entitled to such purparts, shares, and dividends of the estate real and personal of the deceased, as if he had actually died without any will."* (Purd. Dig. 802. 3 Dall. Laws, 521. 3 Sm. Laws, 152.) Marriage, and the birth of posthumous or other issue, since the passage of this act, do not amount to a *total* revocation of a will made by a single man, even where the subsequent issue is the testator's only child. They amount to a revocation *pro tanto* only, namely, so far as regards the widow and child; but as respects provisions not interfering with their interests, such as the appointment of executors, or a power to sell lands for the payment of debts, &c. the will remains in force. *Coates v. Hughes, 3 Binn. 498.*

(3) *Per Roane J. 3 Call's Rep. 337.*

sonal property it is always a total disposition, because by the appointment of an executor, the whole is vested in him (e).

[19] To raise this presumption of a revocation, both the circumstances of a man's marriage and of the birth of a child must conspire (f): neither the subsequent marriage of a man, nor the subsequent birth of a child, shall of *itself* have that effect. (g) (1).

But a will made in favour of children of a first marriage shall not be revoked by a subsequent marriage, and the birth of children of such subsequent marriage, the second wife and her children being provided for by settlement (h). (2)

In case where a testator, a widower, having a son and two daughters, by will gave all his real and personal estates in trust, subject to debts, for those children, and in case of their deaths over, and afterwards married, had a daughter and died; the general principles of this branch of the law are so clearly defined by the Master of the Rolls, that it is thought most useful to introduce his judgment *verbatim*. "Long after it had been settled by decisions of the ecclesiastical court, with the concurrence of common law Judges sitting in the Court of Delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property, it remained a doubt whether such an alteration of circumstances would have the same effect with regard to a will of real estate: but it is now settled, that even a devise of land may be revoked by what Lord *Kenyon*, in the case of *Doe* on the demise of *Lancashire v. Lancashire*, 5 T. Rep. 58., calls 'a total change in the situation of the testator's family.' What may be deemed such a total change may be matter of controversy in each new case; but all the cases, in which hitherto wills of land have been set aside upon this doctrine, have been very simple in their circumstances; and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate, disposed of by a will, made before his birth. The condition, implied in those cases, was, that

(e) *Brady v. Cubitt*, Dougl. 39. in note.
Southcot v. Watson, 3 Atk. 228.

(f) *Woodes*, 373. vid. *Goodtitle v. Newman*, 3 Wils. 516. and 2 Fonbl. 2d edit. 350. note (b). Sed vid. *Lancashire v. Lancashire*, 5 Term Rep. 52.

(g) *Lancashire v. Lancashire*, 5 Term Rep. 51. in note. *White v. Barford*, 4 Maul. and Sel. 10.

(h) *Ex-parte the Earl of Ilchester*, 7 Ves. jun. 348.

(1) *Brush v. Wilkins*, 4 Johns. Cha. Rep. 506. (*semble*.) *Massey v. Massey's Lessee*, 4 Harr. & Johns. 141. See 3 Mass. Rep. 21. In *North Carolina*, before the act of 1808, the birth of a child after the making of a will, did not amount to a revocation. *McCay v. McCay*, 1 Murphy's Rep. 447.

(2) *Yerby v. Yerby*, 3 Call's Rep. 334, in which there was no settlement, and the children of the subsequent marriage were totally unprovided for.

“ the testator, when he made his will in favour of a stranger or
 “ some more remote relation, intended that it should not operate if
 “ he should have an heir of his own body. In this case there is
 “ no room for the operation of such a condition; as this testator had
 “ children at the date of the will, of whom one was his heir appa-
 “ rent, who was alive at the time of the second marriage, of the
 “ birth of the children by that marriage, and of the testator’s death.
 “ Upon no rational principle therefore can this testator be supposed
 “ to have intended to revoke his will on account of the birth of
 “ other children; those children not deriving any benefit whatsoever
 “ from the revocation; which would have operated only to let in
 “ the eldest son to the whole of that estate, which he had by the
 “ will divided between that eldest son and the other children of
 “ the first marriage. It is true, the ecclesiastical court has decid-
 “ ed, that the will was revoked as to the personal estate; that is,
 “ in opposition to their decision in *Thompson v. Sheppard* in
 “ 1779; where, under circumstances precisely the same, the will
 “ was held not revoked even as to the personal estate. There was
 “ in that case an appeal to the Delegates, but it was not prosecuted.
 “ The revocation however as to the personal estate had an effect,
 “ which might perhaps have been intended by the testator—that
 “ of letting in the after-born children with those of the first mar-
 “ riage: but the principle of the decision has no bearing whatso-
 “ ever upon the devise of the real estate; which, according to my
 “ opinion, stands unrevoked (*i*).”

In a late most important case, where a man made a will, provid-
 ing for all his children then living, and with which his wife was
 ensient, the birth of other children, combined with circumstances
 of large increase of property, and declarations of the testator,
 were held to revoke his will (*k*).

If a single woman make a will, her subsequent marriage shall
 alone revoke it (*l*); nor shall it be revived by the death of her hus-
 band (*m*). (1)

There are also revocations (*n*) in the nature of adempptions. If
 the testator do any act inconsistent with the operation of the will,
 such act shall amount to a revocation of it. To render a cancella-

(*i*) *Sheath v. York*, 1 Ves. & Bea. 390. and see *Holloway v. Clarke*, 1 Phill. Rep. 339. *Emerson v. Boville*, *ibid.* 342.

(*k*) *Johnston v. Johnston*, 1 Phill. Rep. 445.

(*l*) 4 Co. 60. *Cotter v. Laver*, 2 P. Wms. 624. *Hodsdon v. Lloyd*, 2 Bro. C. Ca. 534.

(*m*) *Doe v. Staple*, 2 Term. Rep. 695.

(*n*) *Brudenell v. Boughton*, 2 Atk. 272.

(1) Mr. Cruise, in his *Digest of the Law of Real Property*, (2d Am. edit. p. 118. vol. 2.) states the law to be, that “in a case of this kind if the wife survive her husband, her will is revived, and takes effect as if she had never been married.” See also *Reeve’s Dom. Relations*, 161. It will be found upon examination that the case of *Doe v. Staple* by no means establishes the doctrine of the text, though some of the *dicta* of Lord *Kenyon* support it, when the facts of the case, with reference to which he spoke in giving judgment, are not taken into consideration

tion effectual, we have seen, the intention of the testator must in all cases concur, and an implied revocation is founded entirely on the intention: but the species of revocation I have just mentioned is altogether independent of intention (*o*), and may prevail even in opposition to it. It is true that before the statute of frauds the intention was the criterion. It was therefore held, that where A. having devised lands to B. in fee, granted to B. a lease of the same lands, to commence after A.'s death, such act revoked the disposition of the will, on the ground that the lease clearly implied an alteration of intention, namely, to give the devisee a less estate (*p*). (1) But since the statute I conceive such a case would be differently decided: The lease effectuating no alienation of the subject matter of the devise, would not be held to defeat the operation of the will; nor if A. were to devise lands to B. in fee, and afterwards mortgage to him the same lands for a term of years, would the devise be revoked (*q*). On the same principle, since the statute of frauds, the subsequent act of the devisor must be complete to produce such effect. Before the statute, a deed of feoffment without livery, a bargain and sale without enrolment, a grant of reversion without attornment, were held to revoke a will of lands, on the ground, that although these acts were themselves imperfect, yet they equally indicated a change of the devisor's intention; but since the statute, I apprehend that acts thus incomplete, not amounting to an alienation of the estate inconsistent with such will, would not be more effectual to revoke it than a subsequent will imperfectly executed (*r*).

And altogether to defeat the disposition by the will, there must [21] be a subsequent conveyance of the whole estate. It must be commensurate with the appointment which the will has made. If the inconsistency between the disposition by the will, and the subsequent disposition, be merely partial, the revocation shall not extend beyond such inconsistency. As, where A. devises an absolute estate in fee to B., and afterwards, by a subsequent devise, gives him only an estate tail in the same land, it is a revocation merely to the extent of the difference between an estate tail, and an estate in fee (*s*). So, if A. devise all his real estate to B., and afterwards, on B.'s marriage, settle upon her a part of such estate, in respect to the remaining part of it the will shall operate (*t*). So, if A. devise lands in fee to B., and afterwards grant a lease to C. for a term of years to commence after A.'s death, or mort-

(*o*) *Abury v. Miller*, 2 Atk. 598. *Parsons v. Freeman*, 3 Atk. 745. *ibid.* 664.

(*p*) *Coke v. Bullock*, Cro. Jac. 49.

(*q*) As to the subsequent case of *Harkness v. Bailey*, Prec. in Ch. 514. it is inaccurate; and see *Baxter v. Dyer*, 5 Ves. jun. 656. and *Peach v. Phillips*,

(*r*) *Sed vid. ex-parte the Earl of Ilchester*, 7 Ves. jun. 378.

(*s*) *Harwood v. Goodright*, Cowp. 90.

(*t*) *Clarke v. Berkeley*, 1 Eq. Ca. Abr. 412. S. C. 2 Vern. 720.

gage the lands to C. for a term of years or in fee, the devise of the fee, subject to the lease (*t*) or mortgage (*u*), either of which is merely the introduction of an incumbrance, shall continue good. If the owner of an unqualified equitable fee devise it by his will, and afterwards the unqualified legal fee be conveyed to him, the will is not thereby revoked, because such conveyance was incident to the equitable fee devised. But if he afterwards take a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, being a change in the quality of the estate, and not incident to the equitable fee (*v*).

A surrender made by a testator of copyholds to the uses of his marriage settlement, is not a total revocation of a surrender made to the use of his will, and a devise of such copyholds, by the devisee, takes the copyhold subject to the charge created by the marriage settlement (*w*).

Where a testator devised real and personal estate to certain uses, and afterwards by deed conveyed it to the same uses until marriage, and then to new uses, providing for his intended wife and the issue of the marriage, and after the deed, and before marriage, by codicil duly attested, and directed to be annexed to his will, he imposed a forfeiture in case of his wife being disturbed, and after the codicil married: it was held that the settlement revoked the will, and that the will was republished by the codicil; that the new uses springing on the marriage did not revoke the codicil, nor did the marriage, and birth of children, as being contemplated by the will (*x*).

I have already stated that this species of revocation may operate even in opposition to the devisor's intention (*y*). Hence, if A., after making his will, suffer recovery, levy a fine, or convey his estate by lease or release, the devise will be revoked, although the use result, or be limited to A. himself (*z*). So, if A. devise lands, [22] and afterwards make a feoffment to the use of his will (*a*), or if A. covenant to levy a fine to the use of such person as he shall name by his will, then makes his will and devises his land, and afterwards levies a fine in performance of his covenant (*b*): or if A., seised in fee, devise an estate in fee to B., and by a conveyance takes back an estate from B. in fee (*c*); or, if A. seised in fee, thinking he has only an estate tail, suffer a recovery in order to

(*t*) *Coke v. Bullock*, Cro. Jac. 49. Roll. Abr. 616.

(*u*) *Harkness v. Bailey*, Prec. in Ch. 515. *Tucker v. Thurston*, 17 Ves. 134.

(*v*) *Ward v. Moore*, 4 Mad. Rep. 368.

(*w*) *Vawser v. Jeffery*, 3 Barn. & Ald. 462. and 2 Swans. Rep. 268.

(*x*) *Jackson v. Hurlock*, 2 Eden's Rep. 263.

(*y*) *Banks v. Sutton*, 2 P. Wms. 718. *Sparrow v. Hardcastle*, 3 Atk. 803.

1 Roll. Abr. 614. *Swift v. Roberts*,

Ambl. 618. *Darley v. Darley*, ib. 653. and Dick. Rep. 397. S. C.

(*z*) *Parsons v. Freeman*, 3 Atk. 741. *Darley v. Darley*, Ambl. 653. *Parker v. Biscoe*, 3 Moore, 24.

(*a*) *Sparrow v. Hardcastle*, 3 Atk. 804. *Swift v. Roberts*, Ambl. 618.

(*b*) *Swift v. Roberts*, Ambl. 610.

(*c*) *Parsons v. Freeman*, 3 Atk. 742. *Bridges v. Duchess of Chandos*, 2 Ves. jun. 431.

confirm his will (*c*), all these cases amount to a revocation. So, if A. be disseised, after making his will, and die before re-entry, the disseisin will have the same effect (*d*).

These are the necessary consequences flowing from the nature of a devise of lands as before defined. It is not an institution of an heir: It is in the nature of a conveyance: It is an appointment of the specific estate, to be completed by a subsequent event, namely, the death of the deviser. The deviser must, therefore, continue to have it unaltered, and without any new modification, to the time of his death, when the devise is to take effect. If, therefore, any new disposition be made subsequently to the will, or, in other words, any new conveyance of that which had been conveyed by the will, it shall defeat the will. It implies an alteration, and the rule, that the estate must pass by the first complete conveyance, becomes applicable (*e*). (1)

[23] On the same principle, where A., seised of a lease for lives, devises it, and afterwards renews, the renewal of the lease is a revocation of the will as to this particular; for by the surrender of the former lease, the testator puts it out of him, divests himself of the whole interest, and it is gone, so that there be nothing left for the devise to work upon, the will must fail (*f*). And the law is the same in regard to chattel leases, if specially bequeathed (*g*); but not otherwise (*h*).

So, if A. specifically bequeath to B. a gold cup, under a particular description, and afterwards sell or give it away, and then buy another gold cup, such newly purchased cup shall not pass to B. by the will, inasmuch as the identical subject is gone (*i*). (2)

If the subsequent conveyance be procured by fraud, it shall have no effect (*h*). (3)

Such are the principles of law in regard to revocations. Equity also proceeds on the same principles; and, following the law, admits no revocation that would not be a revocation on legal grounds.

(*c*) *Sparrow v. Hardcastle*, 3 Atk. 803. See also *Darley v. Darley*, Ambl. 653, and *Dick. Rep.* 397. S. C.

(*d*) 1 Roll. Abr. 616. *Attorney-General v. Vigor*, 8 Ves. jun. 282.

(*e*) *Swift v. Roberts*, Ambl. 618. *Bridges v. Duchess of Chandos*, 2 Ves. jun. 426. *Sparrow v. Hardcastle*, 3 Atk. 803. *Harwood v. Goodright*, Cowp. 90. *Hogan v. Jackson*, ib. 305.

(*f*) *Marwood v. Turner*, 3 P. Wms. 170, 171.

(*g*) *Abney v. Miller*, 2 Atk. 527. *Carte v. Carte*, 3 Atk. 174. *Stirling v.*

Lidiard, 3 Atk. 199. *Rudstone v. Anderson*, 9 Ves. 418. *Attorney-General v. Downing*, Ambl. 571. *Hone v. Medcraft*, 1 Bro. C. C. 261. *Coppin v. Fernyhough*, 2 Bro. C. C. 291. See 1 P. Wms. 597.

(*h*) *Bowers v. Littlewood*, 1 P. Wms. 595.

(*i*) Off. Ex. 23. Vid. *Abney v. Miller*, 2 Atk. 599.

(*h*) *Clymer v. Littler*, 3 Burr. 1244. *Hawes v. Wyatt*, 3 Bro. C. C. 156. S. C. 2 Cox. Rep. 263.

(1) *Minuse v. Cox*, 5 Johns. Cha. Rep. 450. *Walton v. Walton*, 7 Johns. Cha. Rep. 267.

(2) *Walton v. Walton*, 7 Johns. Cha. Rep. 264.

(3) *Smithwick v. Jordan*, 15 Mass. Rep. 113.

Therefore if A., having an equitable estate, make his will, and then execute a conveyance, and dispose of it, or declare the uses [24] to himself, that will be a revocation, in case it would so operate at law on a legal estate (*l*). (1)

But still this revocation is bounded by the rule of law; and therefore, if the conveyance be of part only, and for a partial purpose, it shall be a revocation only *pro tanto* (*m*). (2)

In cases of mortgage, if, as I have already stated, A. devise to B. in fee, and afterwards mortgage to C. for a term of years, that at law is no revocation of the fee. If it be a mortgage in fee, a court of law has no concern with the disposition of the equity of redemption. It takes no notice of such an interest, but considering the land only as a pledge for a debt, which is the personal estate of the mortgagee, of necessity holds, that the land to all other purposes remains unaltered in the mortgagor. It merely decrees the redemption to that person, who would have been entitled if the mortgage had never existed, that is, the devisee. Being discharged, it is as if it had never existed. As, in cases at law, if the mortgage be for a term of years, it is no revocation, it would be incongruous that it should be so in equity in the case of a mortgage in fee, where the act done gives as at law nothing more than a pledge for a debt to the mortgagee, which is personal estate, and would devolve upon his executors (*n*). So, in the case of a conveyance for payment of debts, the surplus resulting or being expressly reserved to the party making it, and his heirs, it is precisely the same case as that of a mortgage. There is no distinction between a general charge for debts, and a charge for a particular debt. The alteration of the estate in substance extends no further than to let in the particular purpose; and whether definite for a particular debt, or indefinite for all debts, makes no difference (*o*). Therefore these cases have been determined in strict analogy to the law.

In like manner, if A. have an equitable interest in fee in an estate, and afterwards take a conveyance of the legal estate to the same uses; as, where A. enters into articles of agreement with B. to buy lands of him, and afterwards devises those lands, and then B. conveys the same pursuant to the articles, this is no revocation in equity; for the equitable right which A. has to the lands to be purchased shall pass by the will, and his heir at law be a trustee for the devisee (*p*).

(*l*) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428. *Rawlins v. Burgis*, 2 Ves. & Bea. 381.

(*m*) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428.

(*n*) 2 Ves. jun. 428. *Ambl.* 31.

(*o*) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428. See also *Williams v. Owen*, *ibid.* 595. and *Cave v. Holford*, *ibid.* 603. in note, and 3 Ves. jun. 650.

(*p*) *Marwood v. Turner*, 3 P. Wms. 169. *Greenhill v. Greenhill*, 2 Vern. 679.

(1) *Walton v. Walton*, 7 Johns. Cha. Rep. 270.

(2) *Livingston v. Livingston*, 3 Johns. Cha. Rep. 148. *Hughes v. Hughes*, 2 Munf. 209. *Matter of Nan Mickle*, 14 Johns. Rep. 324.

In the case of a recovery after a will, though in terms shewing clearly no intention to revoke, a recovery suffered after a will is as much a revocation in a court of equity, as it is in a court of law (*q*). So, if A., after making his will, covenant for a valuable consideration to convey the devised estate to B.; although A. die before the contract is executed, yet the covenant shall revoke the will, on the equitable principle, that what ought to be done is supposed to be done: therefore, as at law, if the covenant had been performed in the testator's lifetime, it would have amounted to a revocation, the covenant by analogy shall have the same effect in equity (*r*); (1) or rather it constitutes the devisee a trustee to perform the contract for the benefit of the executor.

In regard to the republication of wills, since the statute no devise of lands can be republished, unless it be re-executed by the deviser with the same solemnities with which it was executed at first; or by a codicil executed in the same manner, in terms ratifying, confirming, or republishing the will (*s*), or expressive without being restricted to any precise form of words (*t*), of his intention that the will should be considered as bearing the same date with the codicil (*u*). A codicil so executed, although it relate merely to personal estate, yet, if it contain a general clause of confirmation of the will, or sufficiently indicate an intention that the will shall be deemed of the same date with the codicil, shall have the same effect (*v*). (2) In case the will be republished by a codicil, the will and codicil are considered in point of law as constituting [27] but one instrument (*w*). Therefore, in all these instances, lands purchased after the date of the will, and before its re-execution, or before the date of the codicil, or lands contracted for before the date of the will, but conveyed between the date of the will and codicil (*x*), shall pass under the will, if the terms of the will be sufficiently comprehensive to include them. For, when a will is republished, the effect is, that the terms and words of the will shall be construed to speak with regard to the property the testator is seised of at the date of the republication, just the same as if he

(*q*) *Darley v. Darley*, 3 Wils. 6. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 430.

(*r*) *Cotter v. Laver*, 2 P. Wms. 624. *Rider v. Wager*, ib. 329. *Edwards v. Freeman*, ib. 436. *Bennett v. Lord Tankerville*, 19 Ves. 170.

(*s*) *Atcherley v. Vernon*, Com. Rep. 381. *Gibson v. Lord Montfort*, 1 Ves. 492.

(*t*) *Potter v. Potter*, 1 Ves. 442.

(*u*) *Barnes v. Crowe*, 1 Ves. jun. 486. 4 Bro. C. C. 2. S. C.

(*v*) *Gibson v. Ld. Montfort*, 1 Ves. 493.

(*w*) *Atcherley v. Vernon*, Com. Rep. 382. *Barnes v. Crowe*, 1 Ves. jun. 496.

(*x*) *Goodtitle v. Meredith*, 2 Maul. & Sel. 5. *Hulme v. Heygate*, 1 Meri. Rep. 285.

(1) An agreement to sell land, made subsequent to the execution of his will, in pursuance of which articles were prepared, and bonds for the payment of the purchase money taken by the testator, was held not to be a revocation of the will at law. *Hall et ux. v. Bray*, Cox's N. J. Rep. 212.

(2) *Dunlap v. Dunlap*, 4 Desaus. Rep. 321.

had such additional property at the time of making his will. Hence, if A. devise lands by the name of B., C., and D., and purchase new lands, and republish his will, the republication does not concern such new lands, because the will speaks only of the particular lands B., C., and D. (1) But if the testator in his will say, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will (*y*). So, where a testator charged all his estates with payment of debts, and made his son residuary legatee, and afterwards purchased copyholds, which were duly surrendered to the use of his will, and by codicil devised those copyholds to his son in fee, the codicil was held a republication of the will, so as to subject the copyholds to the payment of debts (*z*). Nor is an actual annexation of the codicil to the will, essential to its republication (*a*). Whether a mere annexation to the will of the codicil so executed, but silent in respect to any intention of republishing the will, shall have such operation, is a point on which different opinions have prevailed. Lord Camden C. thought that annexation would of itself demonstrate that intention (*b*); but by other authorities it has been held that annexation alone would not be thus effectual (*c*).

[28] If a will of lands be not executed pursuant to the statute, although a codicil reciting the will be (*d*) thus executed, yet it has been held that the codicil shall not effectuate the will.

An infant, we have seen, is by the stat. 34 & 35 *Hen. 8. c. 5.* disabled from devising land; but if, after attaining the age of twenty-one years, he re-execute, pursuant to the statute, a will of lands made by him before, it shall be effectual (*e*).

A will of personal estate may be expressly republished by a codicil, or other writing, authenticated in the same manner as a will of such property; or by a codicil, or such other writing, from the contents of which such an intention may be fairly inferred; or merely by annexing a codicil, or other writing to such will (*f*), whether it expressly refer to the will or not; or such will may be revived by the mere parol declarations of the testator (*g*). (3)

(*y*)* *Heylyn v. Heylyn*, Cowp. 132. Rolls. Abr. 618. *Beckford v. Parneccott*, Cro. Eliz. 493. *Countess of Strathmore v. Bowes*, 7 Term Rep. 482.

(*z*) *Rowley v. Eyton*, 2 Meri. Rep. 128.

(*a*) *Potter v. Potter*, 1 Ves. 442.

(*b*) *Attorney-General v. Downing*, Amb. 571.

(*c*) *Sympson v. Hornsby*, Prec. Ch. 439. *Hutton v. Sympson*, 2 Vern. 722. *Gibson v. Montfort*, 1 Ves. 493. *Barnes*

v. Crowe, 1 Ves. jun. 497. S. C. 4 Bro. C. C. 9. Vid. also *Coppin v. Fernyhough*, 2 Bro. C. C. 296.

(*d*) *Attorney-General v. Baines*, Prec. Ch. 270.

(*e*) *Herbert v. Torball*, 1 Sid. 162.

(*f*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

(*g*) Off. Ex. 25. *Beckford v. Parneccott*, Cro. Eliz. 493, and Vid. *Abney v. Miller*, 2 Atk. 599.

(1) *Kendall's Ex. v. Kendall*, 5 Munf. Rep. 272.

(2) In *Pennsylvania* a will of lands may be republished by parol. *Havard v. Davis*, 3 Binn. 406.

In a case where copyhold and personal estates were given by will, and so much of the will was revoked by an interlineation, and a codicil to the same effect, and the codicil was afterwards cancelled; it was held that the cancelling the codicil was effectual to set up the original will, notwithstanding the interlineation was left in the will, upon the evidence of intention (*h*).

The statutes of the 32d & 34th of *Hen.* 8. give the power of devising to all having estates in fee-simple, except in joint-tenancy (*i*), (1) over the whole of their socage lands. Persons seised [29] in fee-simple in coparcenary, or in common, in reversion, or remainder, are expressly comprised by the last-mentioned statute (*k*).

Copyhold lands are not within these statutes, since they require that the tenure should be socage, which copyholds are not (*l*); but they are devisable by an application of the doctrine of uses as above stated (*m*).

(*h*) *Utterson v. Utterson*, 3 Ves. & Bea. 122.

(*i*) *Swift v. Roberts*, Amb. 617.

(*k*) Sect. 4. and 7.

(*l*) *Harg. Co. Lit.* 111 b. note 1.

(*m*) *Supr.* 6.

(1) In *Pennsylvania*, by the act of 31st March 1812, "if partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy, or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common. *Provided always*, that nothing in this act shall be taken to affect any trust estate." (*Purd. Dig.* 388. 5 Sm. Laws, 395.)

CHAP. II.

OF THE APPOINTMENT OF EXECUTORS.

SECT. I.

Who may be an executor—who not—how he may be appointed.

AN executor is he, to whom the execution of a last will and testament of personal estate is by the testator's appointment confided (*a*).

In general, all persons are capable of sustaining this character; but there are some exceptions, which I shall presently mention.

The king, it seems, may be appointed an executor, but in that case, as he is presumed to be so engaged in public affairs as to have no leisure to attend to the private concerns of individuals, he has a right to nominate persons to execute the trust for him, as well as auditors to whom such nominees shall account (*b*).

It was formerly a doubt, whether corporations aggregate could [31] be constituted executors, inasmuch as they cannot take an oath for the due execution of the office (*c*); but it now seems settled in the affirmative (*d*), and that, on their being so named, they may appoint persons, styled syndics, to receive administration with the will annexed, who are sworn like all other administrators (*e*). Such corporations as can take the oath of an executor are clearly competent (*f*).

An infant may be appointed an executor (*g*), and even a child *in ventre sa merc*; (*h*) and then if the mother be delivered of two or more children at the birth, they shall all be entitled (*i*). But an infant, although appointed, is by stat. 38 *Geo. 3. c. 87. s. 6.* disqualified from acting in the executorship till he attains the full age of twenty-one years, and an administrator is substituted to act for him in the interval. Before the passing of this act, the law deemed him capable of executing the trust at the age of seventeen (*i*).

(*a*) Off. Ex. 2. 2 Bl. Com. 503. *Farrington v. Knightly*, 1 P. Wms. 548. 553. 576.

(*b*) 3 Bac. Abr. 5. 11 Vin. Abr. 54. 2 Bl. Com. 503. 4 Inst. 335.

(*c*) Off. Ex. 17. 1 Bl. Com. 477.

(*d*) 1 Roll. Abr. 915. *Swinb. 5. s. 1.* 3 Bac. Abr. 5. 11 Vin. Abr. 140.

(*e*) 1 Bl. Com. 28. n. 2 Bac. Abr. 5.

(*f*) *Godolph. 85.* 3 Bac. Abr. 5.

(*g*) Off. Ex. 214. 3 Bac. Abr. 8.

2 Bl. Com. 503.

(*h*) *Godolph. 102.* 3 Bac. Abr. 8.

(*i*) Off. Ex. 214. 11 Vin. Abr. 99

5 Co. 29.

A feme covert is also capable of the office of an executrix, but [32] not without the consent and concurrence of her husband (*k*); and although she be an infant, if her husband be of age and assent, he shall have the execution of the will (*l*).

An alien friend may be an executor (*m*), and so also may an alien enemy, who came here with a safe-conduct, or is commorant here by the king's licence, and under his protection, although he came without a safe-conduct (*n*). Neither outlawry nor attainder incapacitates a party, for he acts *in auter droit*, and for the benefit of the deceased (*o*). Nor had villeinage, during its existence in this country, that effect (*p*).

Nor is poverty, nor even insolvency, a disqualification of him in whom the testator has chosen to repose so great a confidence (*q*). (1)

A disability, however, may arise in various modes, either from the party's being guilty of certain offences against the established religion; or from his being the subject of an enemy's country, and resident within it, or resident here without the king's licence; or, under certain circumstances, from going or residing abroad; or from a defect of understanding.

[33] A person excommunicated is suspended from acting till absolution (*r*). By stat. 3 Jac. 1. c. 5. s. 22. a popish recusant, convicted at the time of the testator's death, is altogether incompetent (*s*).

By stat. 3 Car. 1. c. 2. s. 1. if any person send another abroad to be educated in the popish religion, or to reside in any religious

(*k*) 3 Bac. Abr. 9. Off. Ex. 203.
2 Bl. Com. 503. Sed vide 1 Fonbl. 86.

(*l*) Off. Ex. 215.

(*m*) Off. Ex. 15. 3 Bac. Abr. 6.

(*n*) 1 Bac. Abr. 5. 137. Co. Litt.
129 b. Wells v. Williams, Salk. 46. pl.
1. Ld. Raym. 282. S. C. Lutw. 34.

(*o*) Off. Ex. 16. 3 Bac. Abr. 5. Co.
Litt. 128.

(*p*) Swinb. 5. s. 1. 3 Bac. Abr. 5.
Roll. Abr. 915. 11 Vin. Abr. 141.

(*q*) 3 Bac. Abr. 7. Hill v. Mills,

Salk. 36. Rex v. Raines, Lord Raym.
361. S. C. Salk. 299. 11 Vin. Abr. 143.
Walker v. Woolaston, 2 P. Wms. 582.
3 P. Wms. 388. note b. Aumon. 12 Ves.
jun. 4.

(*r*) Off. Ex. 17. 107. 3 Bac. Abr. 6.
2 Burn's Eccl. Law, 222.

(*s*) Hill v. Mills, 1 Show. 293. 11
Vin. Abr. 142. 144. See 4 Bl. Com.
56. and stat. 3 Jac. 1. c. 5. s. 10. and 30
Car. 2. s. 2. c. 1.

(1) *Higginson v Fabre's Ex.* 3 Desaus. Rep. 93, 94. By the 3d section of the Act of 27th March 1713, establishing Orphan's Courts in *Pennsylvania*, "when any complaint is made to the said Justices, that an executrix having minors of her own, or being concerned for others, is married, or like to be espoused to another husband, without securing the minors' portions or estates, or that an executor or other person having the care and trust of minors' estates, is like to prove insolvent, or shall refuse or neglect to exhibit perfect inventories, or give full and just accounts of the said estates come to their hands or knowledge, then and in every such case the same Justices are hereby required forthwith to call an Orphan's Court, who shall cause all and every such executors and trustees, as also such guardians, &c. to give security to the orphans or minors, by mortgage or bonds, in such sums, and with such sureties, as the said Courts shall think reasonable," &c. (Purd. Dig. 611. 1 Dall. Laws, 98. 1 Sm. Laws, 81.)

house abroad for that purpose, or contribute to his maintenance when there, both the sender, the sent, and the contributor, are subject to the same disability. But by virtue of the stat. 31 *Geo.* 3. c. 32. Roman Catholics who shall make, take, and subscribe the declaration of their religious profession, and the oath of allegiance and abjuration as appointed by that act, shall be exempt from this as well as other disabilities.

By stat. 9 & 10 *IV.* 3. c. 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence, among other incapacities, be disabled from being executors.

Also by the statutes prescribing the qualifications for offices (*t*), [34] persons not having taken the oaths and complied with the other requisites for qualifying, who shall execute their respective offices after the time limited for the performance of those acts, shall incur the same incapacity.

Alienage with relation to a hostile country, accompanied with residence abroad, or residence here without the king's permission, either express or implied, is to be classed as a species of disability; for although the cases in respect to the incapacity of alien enemies are not entirely uniform (*u*), yet this principle of exclusion, thus modified, seems clearly to exist (*v*).

By stat. 5 *Geo.* 1. c. 27., British artificers going out of the realm to exercise or teach their trades abroad, or exercising their trades in foreign parts, who shall not return within six months next after due warning given them, shall be deemed aliens out of his majesty's protection, and are expressly disqualified for executors.

Idiots, and those who are visited with insanity, or whose intellects are destroyed by age, disease, or intemperance; such persons as, having been born blind and deaf, have always wanted the common inlets of knowledge, are all necessarily incapable of the office (*w*).

[35] The authority of an executor, as appears by the definition, is grounded on the will, and may be either express, or implied; absolute, or qualified; exclusive, or in common with others.

He may be expressly nominated, either by a written, or by a nuncupative will (*x*).

He may be constructively appointed merely by the testator's

(*t*) Stat. 25 Car. 2. c. 2. 1 *Geo.* 1. c. 2. s. 10. Off. Ex. 15. Anon. Cro. stat. 2. c. 13. Vide also 13 W. 3. c. Eliz. 142.

(*u*) 3 Bac. Abr. 6. 1 Bac. Abr. 5. 282. *Wells v. Williams*, Lord Raym. 684. *Openheimer v. Levy*, Stra. 1082. *Brooks v. Phillips*, Cro. Eliz. 684. *Brandon v. Nesbitt*, 6 Term Rep. 23. *Watford v. Masham*, Moore 431. *Richfield v. Udall*, Carter 49. 191. *Villa v. Bristow v. Towers*, ib. 35.

(*w*) 3 Bac. Abr. 7.
(*x*) Off. Ex. 7. 3 Bac. Abr. 28. 11
Dimock, Skinner, 370. *Mollay*, lib. 3. *Vin. Abr.* 136.

recommending or committing to him the charge of those duties, which it is the province of an executor to perform, or by conferring on him those rights which properly belong to the office, or by any other means from which the testator's intention to invest him with that character may be distinctly inferred. As if a will direct that A. shall have the testator's personal property after his death, and, after paying his debts, shall dispose of it at his own pleasure; or declare that A. shall have the administration of the testator's goods; this alone constitutes A. an executor according to the tenor. So, where the testator, after giving various legacies, appointed that, his debts and legacies being paid, his wife should have the residue of his goods, on condition that she gave security for the performance of his will; this was held to be sufficient to make her executrix. And so where an infant was nominated executor, and A. and B. overseers, with this direction, that they should have the controul and disposition of the testator's effects, [36] and should pay and receive debts till the infant came of age; they were held to be executors in the mean time (*y*).

His appointment may be either absolute or qualified. It is absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time. It may be qualified, as where A. is appointed to be executor at a given period after the testator's death; or where he is appointed executor on his coming of age, or during the absence of J. S.; or where A. and B. are made executors, and B. is restricted from acting during A.'s life; or where A. and B. are named executors, and if they will not accept the office, then C. and D. are substituted in their room; or where A. is appointed executor on condition that he gives security to pay legacies, or generally to perform the will. So a testator may make A. an executor in respect to his plate and household goods, B. in respect to his cattle, C. as to his leases, and D. in regard to his debts; or appoint A. an executor for his effects in one county, and B. executor for his effects in another; or (which seems more rational and expedient) he may so divide the duty where his property is in various countries. So he may nominate his wife executrix during the minority of his son, or so long as she continues a widow (*z*).

Lastly, an executor may be appointed solely, or in conjunction with others: but, in the latter case, they are all considered by the law in the light of an individual person (*a*).

(*y*) 2 Bl. Com. 503. Off. Ex. 8, 9.
3 Bac. Abr. 27. 11 Vin. Abr. 136.
Godolph. 83. Com. Dig. Administration (B.) Cro. Eliz. 48. Pickering v. Towers, Amb. 364. Swinb. p. 4. s. 4.

(*z*) Off. Ex. 10. 12. 3 Bac. Abr. 28. 30. 11 Vin. Abr. 136. 138. 139.
Carte v. Carte, 3 Atk. 180. Chetham v. Lord Audley, 4 Ves. jun. 72.
(*a*) 3 Bac. Abr. 30. Off. Ex. 95.

SECT. II.

Of an executor de son tort—how a party becomes so.

HAVING thus treated of executors regularly constituted, I proceed now to the consideration of another species of them, who derive no authority from the testator, but who assume the office by their own intrusion and interference. Such an one is styled an executor *de son tort*, or an executor of his own wrong (*b*).

Various are the acts which constitute an executor of this description (*c*), such as his taking possession of, and converting the assets to his own use (*d*); living in the house, and carrying on the trade of the deceased (*e*); paying the deceased's mortgages, or {38} other debts (1) or legacies out of them; suing for, receiving, or releasing the debts due to the estate (*f*); seizing a specific legacy without the assent of the lawful executor (*g*); (2) entering on a lease or term for years (*h*), or an estate *pur autre vie* (*i*), (which is made assets by stat. 29 *Car.* 2. *c.* 3.) especially if he enter in right of the deceased, and do acts on the land, which belong to the office of an executor; as turning the cattle upon it; delivering to the widow more apparel than is suitable to her rank (*k*); answering in the character of an executor to any action brought against him, or pleading any other plea than *ne unques* executor (*l*). And all other acts of a similar nature, however slight (*m*), may have the same consequence, as in one case, merely taking a bible, and in another a bedstead (*n*), were held sufficient, inasmuch as they are the *indicia* of the person so interfering being the representative of the deceased. So if J. S. be appointed by the ordinary to collect the effects, and he exceed his authority, and sell any of them, even such as are perishable (*o*), or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort* (*p*).

[39] So where A. the servant of B. sold goods of C., an intestate, both before and after C.'s death, in consequence of orders

(*b*) Off. Ex. 172. 3 Bac. Abr. 20.

Swinb. 6. s. 22. No. 2. 2 Bl. Com. 507.
11 Vin. Abr. 210.

(*c*) 3 Bac. Abr. 21. 11 Vin. Abr. 205.

(*d*) 5 Co. 33 b. Off. Ex. 172. 11 Vin. Abr. 210, 211.

(*e*) Hooper v. Summerset, 1 Wightwick, 16.

(*f*) Swinb. 6. s. 22. No. 2. Fleice v. Southcol, Dyer, 105. Roll. Abr. 918.

(*g*) 3 Bac. Abr. 21. Godolph. 91.

(*h*) Swinb. 6. s. 22. No. 2. 3 Bac. Abr. 22.

(*i*) Carth. 166.

(*k*) Off. Ex. 175.

(*l*) 3 Bac. Abr. 21. Godolph. 92.

(*m*) Padget v. Priest, 2 Term. Rep. 100. Stokes v. Porter, Dyer, 166 b. 11 Vin. Abr. 212.

(*n*) 3 Bac. Abr. 24. Noy. 69.

(*o*) Off. Ex. 174.

(*p*) Off. Ex. 175. 11 Vin. Abr. 209.

(1) *Howell's Adm. v. Smith*, 2 McCord's Rep. 516.

(2) Or by buying at sheriff's sale goods of the intestate, sold under an execution issued upon a judgment fraudulently confessed to him by the intestate, with the view to defeat creditors. *Osborne v Moss*, 7 Johns. Rep. 161.

given by him in his lifetime, and paid the money arising from such sale into the hands of B.; and D. had also, in the capacity of a servant, sold other goods of the intestate; on an action brought against B. and D. as executors, for a debt due from the deceased, they, not having discharged themselves by payment of the money, which they had respectively received to the rightful administrator at the time when the action was commenced, or even when they pleaded, were both adjudged liable as executors of their own wrong (*g*).

So where a creditor took an absolute bill of sale of the goods of the debtor, but agreed to leave them in his possession for a limited time, before the expiration of which the debtor died, and the creditor took and sold the goods; he was held liable to the extent of their value, as executor *de son tort*, for the debts of the deceased (*r*). (1).

So by stat. 43 *Eliz. c. 8.*, if administration by fraud be granted to an insolvent person, who gives any of the effects to A., or releases a debt due from him to the intestate, A., for so much, shall be executor *de son tort* (*s*).

[40] But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship (*t*); such as locking up the goods; directing the funeral, in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (*u*); making an inventory of his property (*v*); advancing money to pay his debts or legacies (*w*); feeding his cattle; repairing his houses; providing necessaries for his children (*x*); for these are offices merely of kindness and charity.

And although, as I have stated, a party may be executor *de son tort* of a term actually existing, and in that case cannot enlarge his estate by claiming in fee, yet if he enter generally on lands, of which there is no term in being, he cannot qualify his wrong by expressly claiming only a particular estate, but must be a disseisor

(*g*) *Padget v. Priest et al.*, 2 Term No. 2. 2 Bl. Com. 507. 11 Vin. Abr. Rep. 97. 207. *Harrison v. Rowley*, 4 Ves. jun.

(*r*) *Edwards v. Harben*, 2 Term 216. Rep. 587.

(*v*) *Swinb. ibid.*

(*s*) Vin. Off. Ex. 182, 183.

(*w*) 3 Bac. Abr. 22. Godolph. 92.

(*t*) 3 Bac. Abr. 22. Godolph. 93, 94.

(*x*) *Swinb. ibid.*

(*u*) Off. Ex. 174. *Swinb. 6. s. 22.*

(1) *Dorsey v. Smithson*, 6 Harr. & Johns. 61. See, however, *King v. Layman*, 1 Root. Rep. 104, where it was held that intermeddling with the goods of a deceased person, held by a bill of sale from the decedent, although it be fraudulent, will not make a man an executor *de son tort*. Where a person drew an order upon his agent, who was in possession of property for the purpose of selling, upon which the agent himself had a lien, and the order was accepted, and the drawer then died, the Court held, that such order was essentially an assignment for valuable consideration, and that the agent might sell the property, retain his debt, and pay the order, without making himself responsible as executor *de son tort*. *De Bessé v. Napier et al.*, *Barr.* 1 McCord's Rep. 107, by three judges against two.

in fee, and not an executor *de son tort* (*y*). (1) Nor can there, generally speaking, be such an executor, when there is a rightful executor, or where administration has been duly granted; for, if after probate of the will or administration granted, a stranger take possession of the property, he may be sued as a trespasser by the executor or administrator; but it is otherwise if, after taking such [41] possession, he claim to be executor, pay or receive debts, or pay legacies, or otherwise intermeddle in that character (*z*); for in all those cases he becomes an executor of his own wrong.

Whether a man has made himself such an executor, is a question not to be left to a jury, but is a conclusion of law resulting from the facts established in evidence (*a*).

SECT. III.

Of the renunciation or acceptance of an executorship.

AN executor may, if he please, decline to act, but he has no power to assign the office (*b*). On his being cited by the ordinary, pursuant to stat. 21 H. 8. c. 5., to come in and prove the will, if he neglect to appear, he is punishable by excommunication for a contempt (*c*). If he appear, either on citation, or voluntarily, and pray time to consider whether he will act or not, the ordinary may, though the practice seems now obsolete, grant letters *ad colligendum* in the interim (*d*): If he refuse, he cannot be compelled to [42] accept the executorship, and his renunciation is entered and recorded in the spiritual court before the ordinary. A refusal, by any act *in pais*, as a mere verbal declaration to that effect, is not sufficient; but, to give it validity, it must be thus solemnly entered and recorded, and then administration with the will annexed will be granted to another (*e*).

If the executor refuse to take the usual oath, or, being a quaker, to make the affirmation, this amounts to a refusal of the office, and shall be so recorded (*f*).

In case the ordinary himself is nominated executor, he may renounce before the commissary (*g*).

(*y*) 3 Bac. Abr. 23, 24. Mayor of Norwich v. Johnson, 3 Lev. 35. S. C. 3 Mod. 90. and 2 Show. 457.

(*z*) 3 Bac. Abr. 22. 5 Co. 33 b. Anon. Salk. 313, pl. 19. 11 Vin. Abr. 212.
(*a*) Padget v. Priest, 2 Term. Rep. 99.

(*b*) 3 Bac. Abr. 42.

(*c*) Off. Ex. 37. Vid. infr.

(*d*) Broker v. Charter, Cro. Eliz. 92.

(*e*) Off. Ex. 38. 4 Burn. Eccl. L.

198. Swinb. 6. s. 12. Roll. Abr. 907.

(*f*) 4 Burn. Eccl. L. 213. Rex v. Raines, 1 d. Raym. 363.

(*g*) Ibid. 38.

(1) No intermeddling with the lands of the deceased will charge a person as executor *de son tort*, it being merely a wrong done to the heir or devisee. *Mitchell v. Lunt*, 4 Mass. Rep. 659. Nor can lands of an intestate be sold under a judgment obtained against an executor *de son tort*, *Mitchell v. Lunt*, *Nuss v. Van-der-Bruggen*, 7 Serg. & Rawle, 193.

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with.

An executor cannot in part refuse; he must refuse entirely, or not at all (*h*).

After such refusal, and administration granted, the party is incapable of assuming the executorship (*i*) during the lifetime of [43] such administrator; but, after the death of the administrator, the executor may retract his renunciation, however formally made; but if administration be committed in consequence merely of his failure to appear on the above-mentioned process, he has a right, at any future time, even in the administrator's lifetime, to come in and prove the will (*k*).

If he appear, and take the usual oath before the surrogate, he has made his election, and cannot afterwards divest himself of the office, but may be compelled to perform it (*l*).

So, if he once administer, he is absolutely bound (*m*); and by stat. 37 *Geo.* 3. c. 90. s. 10. if he administer, and omit to take probate within six months after the death of the deceased, he is liable to the penalty of fifty pounds (*n*).

The acts which amount to an administration are all such as indicate an election of the executorship (*o*), and within this class all such acts as constitute an executor *de son tort* are of course comprehended (*p*). Hence, it hath been adjudged, that if he take the [44] goods of a stranger, under an idea that they belonged to the testator, and with an intent to administer them, this act is sufficient to charge him; as, where the testator was tenant at will of certain goods, and the executor seized them, supposing they were part of the deceased's effects and intending to administer them, this was held to be an election of the office (*q*). (1) But it is otherwise if the executor take the testator's goods on a claim of property in them himself, although it afterwards appear that he had no right, since such claim is expressive of a different purpose from that of administering as executor (*r*). So, if an executor sequester goods in the character of a commissary, that is no assent to the executorship (*s*).

(*h*) 11 Vin. Abr. 139. Anon. Brownl. 301. 304. 307.

82. *Fooler v. Cooke*, 1 Salk. 297.

(*n*) *Vid. infr.*

(*i*) Swinb. 6. s. 12. 3 Bac. Abr. 42, 43. Off. Ex. 39.

(*o*) 3 Bac. Abr. 44. Roll. Abr. 917. 11 Vin. Abr. 205.

(*k*) Off. Ex. *ibid.* Com. Dig. Admon. (B. 4.) *infr.*

(*p*) 3 Bac. Abr. 44. Roll. Abr. 917. Swinb. p. 6. s. 22.

(*l*) Swinb. 6. s. 12. 1 Ventr. 335. 11 Vin. Abr. 207.

(*q*) Roll. Abr. 917. 11 Vin. Abr. 206.

(*m*) 4 Burn's Eccl. L. 198. Swinb. 6. s. 12. *Wankford v. Wankford*, Salk.

(*r*) 3 Bac. Abr. 44. Roll. Abr. 917.

(*s*) Roll. Abr. 917. 11 Vin. Abr. 206.

(1) So taking possession and selling part of the personal estate of the testator, and paying some of his debts, are proof of election to act as executor, and render a person chargeable as such. *Van Horne v. Fonda*, 5 Johns. Cha. Rep. 388.

But if there be two executors, and one of them have a specific legacy bequeathed to him, and take possession of it without the consent of his co-executor, such act amounts to an administration (*t*). So, if an executor have refused before the ordinary, and administration hath been granted, if it appear he had administered before, and thus determined his election, the letters of administration may be revoked, and he may be enforced to prove (*u*).

If there be several executors, they must all duly renounce, before the administration with the will annexed can be granted (*v*).

[45] If some of them renounce before the ordinary, and the rest prove the will, the renunciation is not peremptory; such as refused may, at any subsequent time, come in and administer, and although they never acted during the lives, they may assume the execution of the will after death, of their co-executors, and shall be preferred before any executor appointed by them (*w*). And if administration be committed before a refusal by the surviving executor, such administration will be void (*x*).

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter; but he may take upon himself the latter, and refuse the former (*y*).

SECT. IV.

Of an executor before probate of the will.

As a consequence of the principle that an executor derives all [46] his title from the will, his interest is completely vested at the instant of the testator's death; and therefore before probate, that is, before the will is authenticated in the spiritual court, and a copy of it delivered to him, certified under the seal of the ordinary, he may lawfully perform almost every act which is incident to the office (*z*). Not to mention the funeral, he may make an inventory, and possess himself of the testator's effects (*a*): he may enter peaceably into the house of the heir, and take specialties, and other securities for the debts due to the deceased (*b*), or remove his goods (*c*): he may pay or take releases of debts owing from the estate: he may receive or release debts which are owing to it (*d*): he may

(*t*) Roll. Abr. 917. 11 Vin. Abr. 206.

(*u*) Off. Ex. 40.

(*v*) Roll. Abr. 907.

(*w*) 5 Co. 28. 9 Co. 36 b. Anon. Dyer, 160. House v. Lord Petre, 2 Salk. 311. Mead v. Lord Orrery, 3 Atk. 239. Robinson v. Pett, 3 P. Wms. 251. vid. also Rex v. Simpson, Burn. 1163. S. C. 1 Bl. Rep. 456. 11 Vin. Abr. 50. 66.

(*x*) Wankford v. Wankford, Salk. 308.

(*y*) Shep. Touchst. 464.

(*z*) Com. Dig. Admon. B. 9. Plowd. Com. 280. Smith v. Milles, 1 Term Rep. 480. 3 Bac. Abr. 52. Off. Ex. 34. 11 Vin. Abr. 202. Wankford v. Wankford, 1 Salk. 299.

(*a*) Off. Ex. 34.

(*b*) Off. Ex. 34.

(*c*) Ibid. 92. Vid. infr.

(*d*) Ibid. 35.

sell, give away, or otherwise dispose, at his discretion, of the goods and chattels of the testator (*e*): he may assent to or pay legacies (*f*): he may enter on the testator's term for years (*g*): he may *commence* actions in right of the testator, as for trespass committed, or goods taken, or on a contract made in the testator's lifetime, although he cannot declare before probate, since, in order to assert such claims in a court of justice, he must produce the copy of the will, certified under seal as above-mentioned, or as it is sometimes styled, the letters testamentary; but when produced, [47] they shall have relation to the time of suing out the writ (*h*). So, if in the same right he file a bill in equity, a subsequent probate shall be equally available (*i*); and, according to a late case, it seems sufficient if it be obtained at any time before the hearing (*k*). So, an executor may before probate arrest a debtor to the estate, and shall be justified in that act by the relation of the subsequent grant (*l*). But such relation shall not prejudice a third person; and therefore where the debtor, after being arrested by the executor before probate, paid a debt to J. S., and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest, so as to invalidate that payment (*m*).

An executor may also *maintain* actions on his own possession, as trespass, detinue, or replevin, for goods or cattle of the testator taken after the testator's death (*n*): so, if he be entitled as executor to the next presentation to a living, and it become void, he, or his grantee, may maintain a *quare impedit* for it before probate (*o*).

[48] So he may maintain actions, as trespass or trover, for such of the effects as never came into his actual possession, taken or converted after the testator's decease (*p*). So he may maintain actions on contracts either actually made with him subsequent to that event, or arising by legal implication, as assumpsit for the goods sold by him (*q*), or for money due to the testator, received by the defendant after the testator's death (*r*). In all such cases, the causes of action arise subsequent to the attaching of the plaintiff's right, and therefore he need not describe himself as executor (*s*), and

(*e*) Ibid. 35.

(*f*) Ibid. 35. 11 Vin. Abr. 204.

(*g*) 11 Vin. Abr. 203.

(*h*) 11 Vin. Abr. 202. et seq. Com. Dig. Admon. B. 9. Off. Ex. 36. 3 Bac. Abr. 53. 9 Co. 38. Harg. Co. Litt. 292 b.

(*i*) *Humphreys v. Ingledon*, 1 P. Wms. 752. *Humphreys v. Humphreys*, 3 P. Wms. 351.

(*k*) *Patten, executrix, v. Panton*, 1793, cited 3 Bac. Abr. 53.

(*l*) Off. Ex. Suppl. 103. Roll. Abr. 917.

(*m*) 11 Vin. Abr. 204. 3 Bac. Abr. 53. Com. Dig. Admon. B. 9. *Duncomb v. Walker*, 3 Lev. 57. *Skinn*

22. 87. *Cooke's Bank*. Laws, 4th edit. 94.

(*n*) 11 Vin. Abr. 203. Off. Ex. 36.

(*o*) 3 Bac. Abr. 53. Off. Ex. 36. Com. Dig. Pleader, O. 14. *Smithley v. Chomeley*, Dyer, 135.

(*p*) 3 Bac. Abr. 53. *Frederick v. Hook*, Carth. 154.

(*q*) Off. Ex. 36, 37. in note 1. *Anon. Ventr.* 109. *Bollard v. Spencer*, 7 Term Rep. 358. *Harris v. Hanna*, Ca. Temp. Hardwicke, 204. *Cockerill v. Kynaston*, 4 Term Rep. 277.

(*r*) *Nicholas v. Killigrew*, Lord Ray 436.

(*s*) *Smith v. Barrow*, 2 Term Rep. 477.

consequently no proof of the letters testamentary is requisite. (1) So, where a reversion for years is vested in him in that character, he may avow without probate for the rent which accrued after the testator's death, but not for such as accrued before (*t*).

Such are the acts, which an executor, although the will has not received the sanction of the spiritual court, is warranted in performing, and which his death before probate will not annul (*u*).

On the other hand, if he have elected to administer, he may [49] also before probate be sued at law, or in equity, by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible (*v*).

If an executor die before probate, he is considered in point of law as intestate in regard to the executorship (*w*), although he have made a will and appointed executors; and although he die after taking the oath, if before the passing of the grant.

If A. be executor for a certain period, and B. be nominated executor for the time subsequent, and A. prove the will; after the time is expired, B. may sue without another probate (*x*).

SECT. V.

Of the probate.—Jurisdiction of granting the same—of bona notabilia.

I PROCEED now to consider the probate of a will. The jurisdiction of proving wills consequent, as will be hereafter shewn, [50] on the power of granting administrations, regularly belongs to the bishop of the diocese, or the metropolitan of the province, in which the parties resided at the time of their death (*y*). But if a testator die within some peculiar jurisdiction, which is either regal, archiepiscopal, episcopal, or archidiaconal: in each of these the owner hath of common right the power of granting probate. This privilege is founded on the notion of an original composition between such owner and the ordinary of the diocese for that purpose (*z*).

(*t*) Wankford v. Wankford, 1 Salk. 302. 307. Bollard v. Spenser, 7 Term Rep. 359.

(*u*) Off. Ex. 35. 11 Vin. Abr. 204. Anon. Dyer, 367. Wankford v. Wankford, 1 Salk. 306, 307.

(*v*) Com. Dig. Admon. B. 9. Plowd. Com. 280 b. 11 Vin. Abr. 205. Dulwich College v. Johnson, 2 Vern. 49.

Off. Ex. 37.

(*w*) Off. Ex. Suppl. 74, 75. 182. 11 Vin. Abr. 68. 90.

(*x*) Com. Dig. Admon. B. 9. Ca. Ch. 265. 11 Vin. Abr. 56.

(*y*) 3 Bac. Abr. 34. 39. Com. Dig. Admon. B. 6. 4 Burn's Eccl. L. 188.

(*z*) 3 Bac. Abr. 39. Denham v. Stephenson, Salk. 40, 41. 11 Vin. Abr. 77.

(1) In all cases of promises express or implied made to or by an executor or administrator after the death of the testator or intestate, an action lies by or against the executor or administrator *personally*. *Grier v. Huston*, 8 Serg. & Rawle, 192. See *Coburn v. Ansturt*, 3 Mass. Rep. 318; 8 Mass. Rep. 190.

Courts baron, which have had the probate of wills from time immemorial, and have always continued that usage, are also entitled to this species of jurisdiction; but they can claim it only by prescription (*a*).

By custom also the probate of wills of burgesses belongs to the mayors of some boroughs in respect of lands devisable within the same; yet, as to personal property, the will must be proved before the ordinary (*b*).

But in general a probate can be granted only in the court of the ordinary, or of the metropolitan.

[51] If all the effects at the time of the testator's death lie within one diocese, the executor ought regularly to appear before the bishop, or his surrogate, and prove the will.

But if the testator hath left *bona notabilia*, or effects to the value established by 92 canon *Jac.* 1. namely, a hundred shillings, in two distinct dioceses, or in several peculiars within the same province; then the will must be proved before the metropolitan, by way of special prerogative (*c*); whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York (*d*). So if there be *bona notabilia* in those several provinces, the archbishops shall in each of them grant a probate according to the *bona notabilia* in their respective provinces. Each of them has supreme jurisdiction, and neither can act within the province of the other (*e*). If there be *bona notabilia* in different dioceses of one province, and in one diocese only of the other; in respect to the former, the archbishop shall have the probate; in respect to the latter, the particular bishop (*f*).

[52] So if the testator, not in *itinere*, die in one diocese, not having any goods there, but having *bona notabilia* in another diocese, the archbishop shall grant the probate (*g*).

So if the goods be in several peculiars of a bishop's diocese, in that case probate shall not be granted by him, but by the metropolitan, inasmuch as peculiars are exempt from ordinary jurisdiction (*h*). But where the testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be several probates: the archbishop shall have no prerogative, because the peculiar was derived out of his episcopal ju-

(*a*) 3 Bac. Abr. 39. Off. Ex. 44. Denham v. Stephenson, Salk. 41. Atkins v. Hill, Cowp. 286.

(*b*) 3 Bac. Abr. 40. Off. Ex. 45. Off. Ex. Suppl. 10.

(*c*) 2 Bl. Com. 509. 3 Bac. Abr. 36. Com. Dig. Admon. B. 3. Off. Ex. 45. 48. 4 Burn. Eccl. L. 191. Roll. Abr. 909. 11 Vin. Abr. 79. Swinb. p. 6. s. 11.

(*d*) 2 Bl. Com. 509. 11 Vin. Abr.

56, pl. 7. Vin. Harg. Co. Litt. 94.

(*e*) 3 Bac. Abr. 36. Burston v. Ridley, 1 Salk. 39. Shaw v. Stoughton, 2 Lev. 86. 11 Vin. Abr. 76. pl. 15. Off. Ex. 48.

(*f*) Off. Ex. 48.

(*g*) 3 Bac. Abr. 36. Roll. Abr. 909. 4 Burn. Eccl. L. 189. 11 Vin. Abr. 80.

(*h*) 4 Burn. Eccl. L. 191. 11 Vin. Abr. 80. Gibs. Cod. 472. Swinb. p. 6. s. 11.

risdiction (*i*). By the canon 92 *Jac.* 1. above referred to, goods which a man has with him, who dies in *itinerare*, shall not make *bona notabilia* (*k*); but if a man have two houses in different dioceses, and resides chiefly at one, but sometimes goes to the other, and being there for a day or two, dies, leaving no *bona notabilia* in the first mentioned house, probate shall be granted by the bishop of the diocese in which the testator died, for he was commorant there, and not there as a traveller (*l*).

[53] If there be *bona notabilia* in England and Ireland, several probates shall be granted by the archbishop or bishop in England, and the archbishop or bishop in Ireland, as the case may require (*m*). The probate of a bishop's will, although he had goods only in his own jurisdiction, belongs to the archbishop of the province (*n*). If the testator died beyond sea, although the goods be in one diocese only, the archbishop is to grant the probate (*o*). If the probate be granted by a bishop, or inferior judge, when it does not belong to him, it is void; but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reversed by sentence, for he hath jurisdiction over all the dioceses within his province (*p*).

In the above-mentioned canon, *Jac.* 1. there is a provision, that the jurisdiction of those dioceses shall not be prejudiced where, by composition or custom, *bona notabilia* are rated at a greater sum, as in London, where by composition they are to amount to ten pounds (*q*).

Nor is it necessary that the deceased should have left effects to the value of five pounds in each of the several dioceses where they are dispersed; if there be effects in any one diocese, other than that [54] in which he died, to the amount of five pounds, they constitute *bona notabilia* (*r*). But if the goods in the diocese where he died be of the value of ten pounds or upwards, and he have not left goods amounting to five pounds in another diocese, they shall not be denominated *bona notabilia* (*s*). If goods be left in two dioceses to the amount of five pounds in the whole, they shall be *bona notabilia*, and consequently subject to the archbishop's jurisdiction (*t*), for in that case neither of the bishops has an exclusive authority. *Bona notabilia* may consist of goods to the value of five pounds in one diocese, and a lease or term for years of that value in another, in which the lands lie (*u*).

(*i*) 4 Burn. Eccl. L. 191. Gibbs. Cod. 472. Cro. El. 719. Vid. 1 Bl. Com. 380.

(*k*) Vid. Off. Ex. 45. & Suppl. 27.

(*l*) 4 Burn. Eccl. L. 191. Hilliard v. Cox, 1 Salk. 37.

(*m*) 3 Bac. Abr. 36. Daniel v. Luker, Dyer, 305. Roll. Abr. 908. Gibbs. Cod. 472.

(*n*) 3 Bac. Abr. 37. 4 Inst. 335

(*o*) Ib. Ib. 35. Roll. Abr. 908.

(*p*) Ib. Ib. 36. 4 Burn. Eccl. L. 193. Off. Ex. Suppl. 27. 11 Vin. Abr. 75. 80. Gibbs. Cod. 472.

(*q*) 3 Bac. Abr. 37. Off. Ex. 45.

(*r*) Ibid. 87. Godolph. 69.

(*s*) Ibid. 37. Ibid. 69.

(*t*) 4 Burn. Eccl. L. 189. Roll. Abr. 908, 909.

(*u*) 3 Bac. Abr. 37. Com. Dig. Admon. B. 4.

Debts due to the deceased, however difficult to be collected, or however desperate, may make *bona notabilia* (*v*).

So, it seems, a debt due from the king, for which there is no remedy but by petition, may fall within the same description (*w*).

But if there be a bond in the penalty of five pounds to secure the payment of a less sum, and the same be forfeited, it shall not be classed among *bona notabilia* (*x*). And it was so held even ante-[55] cedently to the statute 4 & 5 *Ann. c. 16. s. 13.*, whereby the penalty is saved on bringing principal, interest, and costs into court.

Nor shall lands devised to executors for payment of debts and legacies, although they become assets, be considered as such goods (*y*).

On this point the law makes a distinction between debts by specialty and debts by simple contract. It regards debts by specialty as the deceased's goods in that diocese where the securities are found at the time of his death, although they were entered into in another, or the debtor or creditor, at the time when they were executed, lived in a different diocese (*z*). But debts by simple contract follow the person of the debtor, and therefore are esteemed the deceased's effects in that diocese where the debtor resided at the creditor's death (*a*). On this principle it hath been holden, that a judgment obtained in one of the courts at Westminster, although in an action laid in Dorsetshire, made *bona notabilia*, because the record was at Westminster; but that a debt on a bill of exchange followed the person of the debtor (*b*).

An annuity out of a parsonage shall be reputed to be property in the diocese where the parsonage lies (*c*).

[56] And leases for years where the land lies, not where the lease is merely found (*d*).

Debts on recognizances, statutes, or judgments, shall be *bona notabilia*, where they were acknowledged or given (*e*).

And by statute 4 & 5 *Ann. c. 16. s. 26.* salary, wages, or pay due to persons for work in any of her majesty's yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative courts.

But to obtain an order of the Court of Chancery for the payment of money out of court, however small the amount, a prerogative probate is held to be indispensable (*f*).

(*r*) 3 Bac. Abr. 47. Com. Dig. Admon. B. 4.

(*w*) Off. Ex. 46. 11 Vin. Abr. 80.

(*x*) Off. Ex. 46.

(*y*) 3 Bac. Abr. 37. Off. Ex. 47. 11 Vin. Abr. 80.

(*z*) 3 Bac. Abr. 37. Off. Ex. 46. Roll. Abr. 909. Shep. Touchst. 463.

(*a*) 3 Bac. Abr. 38. Off. Ex. 47.

(*b*) Gold v. Strode, Carth. 149. Denham v. Stephenson, 1 Salk. 49. Ad-

ams v. Savage, Lord Raym. 854. 11 Vin. Abr. 77. 80.

(*c*) Com. Dig. Admon. B. 4. Daniel v. Luker, Dyer, 305. in note. 11 Vin. Abr. 80.

(*d*) Com. Dig. Admon. B. 4.

(*e*) Com. Dig. Admon. B. 4. Daniel v. Luker, Dyer, 305. in note.

(*f*) Newman v. Hodgson, 7 Ves. jun. 409. Thomas v. Davies, 12 Ves. jun. 417.

If the will be not contested, the executor may prove it in the common form by his own oath, and in some of the dioceses of York, with the additional oath of one-witness; or in case its validity is called in question, he will be required to substantiate it more solemnly *per testes*, by the examination of witnesses in the presence of the parties interested, as the widow and next of kin (*g*). This latter mode of proving a will is seldom resorted to, unless at the instance of a party whose object is to oppose it (*h*); but the executor himself may, for greater safety, if he have an interest in the will, elect to have it sanctioned by this more decisive species of evidence, and call on the next of kin to see it propounded (*i*).

[57] When a will is to be thus solemnly proved, two witnesses are indispensable; for generally, by the civil law, the testimony of two persons is requisite, and, therefore, if in the probate of a will that of one witness be disallowed in the ecclesiastical court, no mandamus will lie; for inasmuch as that court has jurisdiction of the subject matter, it has also jurisdiction of the mode of proof, and the proceedings respecting it (*k*).

It is not necessary that such witnesses should have read the will, or heard it read, if they can depose that the testator declared that the writing produced was his last will and testament (*l*), or that he duly executed the same in their presence.

If the will or codicil be written in the testator's hand-writing, although it have neither his name subscribed, nor his seal affixed to it, nor had witnesses present at its publication, yet if the omission of these solemnities afford no presumption of a change of intention (*m*), it is of sufficient validity on proof of the hand-writing (*n*), by the evidence of two persons acquainted with the character of it from having seen him write; if, however, there be a difference of opinion in witnesses as to hand-writing, the ecclesiastical court will receive the evidence of persons skilled in hand-writing by comparison, who had not seen him write (*o*); but in case there be a single subscribing witness to the will, and who appears to attest it, the testimony of one other person only to the above-mentioned effect is requisite.

[58] So, although written by another hand, nor even signed by the testator, if it can be shewn to be according to his instructions, and read over and approved by him, it is equally effectual (*p*).

And so where interrogatories were put to a testator who was *in extremis*, but in full exercise of his testamentary powers, and such interrogatories and his answers were committed to writing,

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|---|---|
| (<i>g</i>) 3 Bac. Abr. 39. 2 Bl. Com. 508. | (<i>l</i>) 4 Burn. Eccl. L. 205. Godolph. |
| 4 Burn. Eccl. L. 205, 207. Godolph. | 66. |
| 65. 1 Ought. 20. Swinb. b. 6. s. 14. | (<i>m</i>) Supr. 3. |
| (<i>h</i>) 4 Burn. Eccl. L. 207. | (<i>n</i>) 2 Bl. Com. 501. |
| (<i>i</i>) 4 Burn. Eccl. L. 208. 1 Ought. | (<i>o</i>) Beaumont v. Perkins, 1 Phill. |
| 20. | Rep. 78. |
| (<i>k</i>) 4 Burn. Eccl. L. 206. Roll. Abr. | (<i>p</i>) 2 Bl. Com. 501. Vid. Limbery |
| 300. Twaites v. Smith, 1 P. Wms. 12. | v. Mason, Com. Rep. 451. |

and read over to and approved by him, it was held good (*q*). But the instructions, to be effectual, must be complete, and not left in an unfinished state, and subject to the further consideration of the testator (*r*).

In granting probate, the form of the instrument is not looked to by the ecclesiastical court, it is the intention of the party, and whether the instrument appears to be testamentary; as a paper expressed to be a deed of gift, and declaring "I do hereby give (after my death)" (*s*), and other cases of the like nature, where the *animus testandi* is clearly shewn (*t*). (1)

If a testamentary paper be in the hand-writing of the deceased, although unfinished and unexecuted, if prevented by the act of God, it will be admitted to probate (*u*).

An executor on taking probate swears that the writing contains the true last will and testament of the deceased, as far as the deponent knows or believes, and that he will truly perform the same by paying first the testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned by the court, and render a just account thereof when lawfully required.

When the will is proved, the original is deposited in the registry of the ordinary or metropolitan, and a copy thereof in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him; and such copy and certificate are usually styled the probate (*v*).

(*q*) *Green v. Skipworth*, 1 Phill. Rep. 53.

(*r*) *Devereux v. Bullock*, 1 Phill. Rep. 60.

(*s*) *Thorold v. Thorold*, 1 Phill. Rep. 1.

(*t*) *Green v. Proude*, 1 Mod. 117. *Rigden v. Vallier*, 2 Ves. 252.

v. Corp, Prerog. Court. 1793. *Hog v. Lashley*, ib. 1789. *Marwick v. Taylor*, ib. 1722. *Shergold v. Shergold*, ib. 1714.

(*u*) *Scott v. Rhodes*, 1 Phill. Rep. 12.

(*v*) 2 Bl. Com. 508. 4 Burn. Eccl. L. 215. 11 Vin. Abr. 56. pl. 7. Bac. Use of the Law, 67.

(1) A paper somewhat in the form of a letter, beginning, "In the name of God, Amen. If I should not come to you again, my son M. shall pay, &c." was held not to be admissible to record as the will of the writer of it, evidence being given that he went to *Kentucky*, and returned, and lived several weeks after. *Wagner v. McDonald*, 2 Harr. & Johns. 346.

[59] SECT. VI.

Of the probate of nuncupative wills.

A NUNCUPATIVE will is also capable of being proved (a). But by the statute of frauds, after six months from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the testimony, or the substance thereof, were committed to writing within six days after the making of such will. And no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired.

Nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please (b). (1) And (as we may (c) remember) no will in writing concerning any goods or chattels, or personal estates, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only; except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at the least.

[60] SECT. VII.

Of the probate of the wills of seamen and marines.

IN regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commissioned officers of marines, and marines serving on board a ship in the king's service, by the statute 55 *Geo. 3. c. 60.* above referred to (d), no will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass or bequeath any wages, pay, prize-money, bounty-money, or other allowances of money, to accrue due for or in respect of the service of any such petty officer or seaman, non-commissioned officer of marines or marine, in his majesty's navy; nor shall any will made or to be made by any such petty officer or seaman, non-commissioned officer of marines or marine, who shall be or shall have been in the service of his majesty, his heirs or successors, or at any time since, be good, valid,

(a) 2 Bl. Com. 500.

(b) Vid. supr. 4.

(c) Vid. supr. 16.

(d) Vid. supr. 5.

(1) The Act of 1705, sect. 5. contains the same provision, *verbatim*. (Purd. Dig. 801, 1 Dall. Laws, 53. 1 Sm. Laws, 33.)

or sufficient to bequeath any such wages, &c. due or to grow due to any such petty officer, &c. unless such will shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged; and also a full description of the degree of relationship or residence of the person or persons to whom or in whose favour, as executor or executors, the same shall be granted or made; and also the day of the month and year, and the name of the place when and where the same shall have been executed; nor shall any such will be good, valid, or sufficient for the purposes aforesaid, unless the same shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned; that is to say, in case any such will shall be made by any such petty officer, &c. at any time or times whilst they shall respectively belong to and be on board of any ship or vessel belonging to his majesty, his heirs or successors, as part of the complement thereof, or be borne on the books of any such ship or vessel as a supernumerary, or as an invalid, or for victuals only, unless such will shall be executed in the presence of and attested by the captain or other officer having the command of such ship or vessel, or (during the absence of such captain or other officer on leave or on separate service) by the commanding officer of such ship or vessel for the time being; and who, in that case, shall state at the foot of such attestation the absence of such captain or other commanding officer from such ship or vessel, at the time of the execution of such will, and the occasion thereof; or in case of the inability of such captain or commanding officer by reason of wounds or sickness, to attest any such will, then, unless such will shall be executed in the presence of and attested by the first lieutenant or other officer next in command of such ship or vessel, who shall state at the foot of such attestation the inability of such captain or commanding officer to attest the same: in case any such will shall be made by any such petty officer, &c. in any of his majesty's hospitals, or on board of any of his majesty's hospital ships, or in any military or merchant hospital, or at any sick quarters either at home or abroad, unless such will shall be executed in the presence of and attested by the governor, physician, surgeon, assistant-surgeon, agent, or chaplain of any such hospital or sick quarters of his majesty, or by the commanding officer, agent, physician, surgeon, assistant-surgeon, or chaplain, for the time being of any such hospital ship, or by the physician, surgeon, assistant-surgeon, agent, chaplain, or chief officer of such military or merchant hospital, or other sick quarters, or one of them: in case any such will shall be made by any such petty officer, &c. on board of any ship or vessel in the transport service, or in any merchant ship or vessel, unless the same shall be executed in the presence of and attested by some commission or warrant officer, or chaplain in his majesty's navy, or some commission officer, or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, assistant-surgeon, or agent of any hospital in his

majesty's naval or military service, who may happen to be then on board of such transport or merchant vessel, or by the master or first mate of such transport or merchant vessel, or one of them : in case any such will shall be made by any such petty officer, &c. after he shall have been discharged from his majesty's service; unless the same (if the party making such will shall then reside in London or Westminster, or within the bills of mortality) shall be executed in the presence of and attested by the inspector for the time being of seamen's wills, or his assistant or clerk; or unless the same (if the party making such will shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid) shall be executed in the presence of and attested by one of the clerks in the office of the treasurer of the navy resident at such port or place; or unless the same (if the party making such will shall then reside at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man) shall be executed in the presence of and attested by one of his majesty's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which such will shall be executed; or unless the same (if the party making such will shall then reside in any other part of his majesty's dominions, or any colony, plantation, settlement, fort, factory, or any other foreign possession or dependency of his majesty, his heirs or successors, or any settlement within the charter of the East India Company) shall be executed in the presence of and attested by some commission or warrant officer or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the church of England or Scotland, or a magistrate or principal officer, residing in any such island, colony, plantation, settlement, fort, factory, or other possession or dependency of his majesty, or settlement within the charter of the East India Company; or (if the party making such will shall then reside at any place not within his majesty's dominions, or any settlement, fort, factory, or other foreign possession or dependency of his majesty, his heirs or successors, or any settlement within the charter of the East India Company), unless the same shall be executed in the presence of and attested by the British consul or vice-consul, or some officer having a public appointment or commission, civil, naval, or military under his majesty's government, or by a magistrate or notary-public, of or near the place where such will shall be executed.

Every will, which hath been, or which at any time or times hereafter shall be made by any such petty officer, &c. at any time or times whilst they were or shall be respectively prisoners of war in parts beyond the seas, are and shall be good, valid, and sufficient; provided such will shall have been executed in the presence of and attested by some commission or warrant officer of his majesty's navy, commission officer of royal marines, physician, sur-

geon, assistant surgeon, agent or chaplain to some naval hospital, or some commission officer, physician, surgeon, assistant-surgeon, or chaplain of the army, or any notary-public.

But no will of any seaman, contained, printed, or written in the same instrument, paper, or parchment, with a letter of attorney, shall be good or available in law, to any intent or purpose whatever.

And all captains and commanders of ships shall, upon their monthly muster books or returns, specify which of the persons mentioned in the said returns have made or granted any will during that month or other space of time from the preceding return, by inserting the date thereof opposite the party's name, under the head of "Will."

But before any such will shall be attempted to be acted upon or put in force, the same shall be sent to the treasurer of the navy, at the navy-pay office, London, in order that the same may be examined by the inspector of seamen's wills, who, or his assistants, shall immediately on receipt of every such will, duly register the same, in a numerical and alphabetical manner, in books to be kept for that purpose; specifying the date of such will, the place where executed, and the name and addition, names and additions of the person or persons to whom or in whose favour, as executor or executors, the same shall have been granted or made; and also the names and additions of the witnesses attesting the same, and shall mark the said wills, with numbers corresponding with the numbers made on the entries thereof in the said books; and the said inspector shall take all due and proper means to ascertain the authenticity of every such will; and in case it shall appear to him, or he shall have reason to suspect that any such will is not authentic, he shall forthwith give notice in writing to the person or persons to whom or in whose favour such will shall have been made, as executor or executors, that the same is stopped, and the reason thereof, and shall also report the same to the treasurer or paymaster of the navy, and shall enter his caveat against such will, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster; but if upon such examination and enquiry it shall appear to the said treasurer, paymaster or inspector, that such will is authentic, the said inspector, or his assistant, shall sign his name to such will, and also put a stamp thereon in token of his approbation thereof.

When any petty officer, &c. who shall have belonged to any ship or vessel of his majesty, his heirs or successors, has died, or shall hereafter die, having left a will or testament appointing any executor or executors therein, no pay, &c. which may have been due or owing to such testator at the time of his death, shall be paid over to or recovered by such executor or executors, except upon the probate of such will, to be obtained in the following manner: *videlicet*, after such will shall have been so transmitted, re-

gistered, inspected and approved, as hereinbefore directed, the inspector of seamen's wills shall issue or cause to be issued, to the person named and described as executor or executrix of such will, a check in lieu thereof, containing directions to return the same, upon the testator's death, to the treasurer or pay master of his majesty's navy; the form of which check is set forth in the act.

And in the event of the testator's death, the minister, officiating minister, or curate of the parish in which the executor or executrix may then reside, shall, upon being applied to for his signature to the certificate at the foot of the check, examine such executor or executrix, and such two inhabitant householders of the parish, as may be disposed to sign the first certificate on the check, touching the claim of the executor or executrix; and being satisfied of his or her being the person described as executor or executrix in the check, the executor or executrix shall subscribe the application subjoined to the check (the blank therein being first filled up agreeably to the truth), in the presence of the said minister, officiating minister, or curate; and the said two inhabitant householders shall also subscribe the said first certificate on the check (the blanks therein being first filled up agreeably to the truth) in the like presence; for which respective purposes the executor or executrix, and the householders, shall attend at such time and place, times and places, as the minister, officiating minister, or curate shall appoint; and the minister, officiating minister, or curate shall sign the second certificate on the check (the blanks therein, and in the description thereunto subjoined, being first filled up agreeably to the truth); and the executor or executrix shall, before his or her examination, or his or her signing the said application, pay to the minister, officiating minister, or curate, a fee of two shillings and sixpence for his trouble on the occasion; and the application and certificates, being completed according to the directions therein given, shall be transmitted by the minister, officiating minister, or curate, by the general post, addressed to the treasurer or to the paymaster of the navy, London; and the original will having been passed and stamped in the manner directed by the act, the inspector of seamen's wills, or his assistant, shall note thereon the amount of wages due to the deceased, as calculated on the search sent to the inspector from the navy office, and shall forward such will to a proctor in *Doctors' Commons*, in order to his obtaining probate thereof: And in case the executor or executrix shall not reside within the bills of mortality, the inspector shall also forward to such proctor a letter addressed to the minister, in the form or to the effect stated in the act.

And such proctor having received the will and the letter so written by the inspector (in case such letter shall be necessary), shall immediately sue out the previous commission or requisition, or take such other proper and legal steps as may be necessary towards enabling the executor or executrix, so applying for probate of the will, to obtain the same; and shall enclose in the letter such pre-

vious commission or requisition, or other legal or necessary instrument, with instructions for executing the same, and also a copy of the will; and the letter and enclosures shall be forwarded to the minister by the general post, agreeably to the address put thereon by the inspector of seamen's wills.

The minister immediately upon the receipt of such previous commission or requisition, or other instrument, is to take such steps as to him may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument, directed by the proctor employed in *Doctors' Commons* to be executed, and the same being so executed, he is to transmit the same to the treasurer or to the paymaster of his majesty's navy, London; and if the person applying for such probate of will, shall be and reside at a distance from the place where wages, prize-money, or other allowances of money due to the deceased are payable, he is to specify and describe the receiver general of the land tax, collector of the customs, collector of the excise, or clerk of the cheque, who may be most convenient or nearest to the person applying for such probate; and the said treasurer, paymaster, or inspector, shall, immediately upon receipt thereof, send the said previous commission or requisition, or other legal instrument, executed by the person applying for the probate as aforesaid, to the aforesaid proctor in *Doctors' Commons*, who, in pursuance thereof, is forthwith to sue out and procure such probate.

And if any proctor or officer of the ecclesiastical court, shall take more for his charges than the sums by the act directed to be taken in the different events therein specified, he shall forfeit fifty pounds; or if he shall be aiding or assisting in procuring probate of a will, or letters of administration, for the purpose of enabling any person to receive such wages, prize-money, or allowance of money, otherwise than in the manner prescribed by these acts, such proctor or other officer shall forfeit five hundred pounds, and for ever after be incapable of acting in any capacity in any ecclesiastical court in Great Britain.

[65] SECT. VIII.

Of the probate under special circumstances.

IF the executor be infirm, or live at a distance, it is usual to grant a commission or requisition to the archbishop, or bishop, in England or Ireland (as the case may be), or if in Scotland, the West Indies, or other foreign parts, to the magistrates or other competent authority, to administer the oath to be taken previous to granting probate of the will (*a*). Otherwise if the executor do not within a reasonable time appear voluntary, he may, as I have already mentioned, pursuant to the statute 21 H. 8. c. 5. (*b*) be cited by

(*a*) Vide 4 Burn. Eccl. L. 298.

(*b*) Supr. 41.

the ordinary *ex officio* to prove or refuse the testament. In case of non-appearance on the process he may be excommunicated, and the goods of the deceased sequestered until the probate (*c*); or administration with the will annexed may be granted, in pain of his contumacy, provided an intimation to that effect be contained in the process.

But the practice of issuing such citations is now become obsolete, unless at the suit of the parties interested: if, however, the [66] executor act, and neglect to take probate within six months after the death of the testator (*d*), by the above-mentioned statute of 37 G. 3. c. 90., he incurs the penalty of fifty pounds.

On the other hand, the ordinary is bound to grant probate of the will: and if the executor accept the office, and claim the probate, in case of the ordinary's refusal to grant it, a writ of *mandamus* may issue from the court of King's Bench to compel him (*e*): for although the spiritual court is to determine whether there be a will or not, yet, if there be a will, the executor has a temporal right, nor shall any terms be imposed on him except such as the will prescribes (*f*). But if the will be litigated, the bishop may, in his return to the writ, state that a suit is depending before him in regard to the same, and not yet determined. And such return will be sufficient (*g*).

This jurisdiction the metropolitan or ordinary may exercise either himself, or by his official; for it is merely a ministerial act, and concerns him not in his spiritual capacity (*h*).

The power of granting probates is not local, but is annexed to the person of the archbishop or bishop; and therefore a bishop, or the commissary of a bishop, while absent from his diocese, may [67] grant probate of wills respecting property within the same; or if an archbishop or bishop of a province or see in Ireland happen to be in England, he may grant probate of wills relative to effects within his province or diocese (*i*).

If the see be vacant, or in case of the suspension of the bishop or archbishop, the dean and chapter are to grant the probate (*k*).

The proving of a bishop's will, although he left goods only within his own jurisdiction, belongs to the archbishop (*l*).

If there be several executors, and one take probate, he takes it with a reservation to the rest. If another apply for that purpose, an engrossment of the original will is to be annexed to the second probate in the same manner as to the first, and in the second grant the first grant is to be recited. And so of the rest. And this is styled a double probate (*m*).

(*c*) Vide 4 Burn. Eccl. L. 201.

(*d*) Supr. 43.

(*e*) 4 Burn. Eccl. L. 201.

(*f*) Rex v. Raine, Ld. Raym. 361. Marriott v. Marriott, Stra. 672.

(*g*) Sir Richd. Raine's Case, Lord Raym. 262. Rex v. Hay, Burr. 2295. 4 Burn. Eccl. Law, 205.

(*h*) 3 Bac. Abr. 39. Archbishop of

Canterbury v. House, Cowp. 140.

(*i*) 3 Bac. Abr. 39. 11 Vin. Abr. 78. Cro. Car. 53.

(*k*) 3 Bac. Abr. 39. Roll. Abr. 908. 11 Vin. Abr. 74, 75, 77. Young v. Case, Lutw. 30.

(*l*) 11 Vin. Abr. 74. 4 Inst. 335. Supr. 53.

(*m*) 4 Burn. Eccl. L. 201

Where several executors are appointed, as formerly mentioned (*n*), with separate and distinct powers, yet, as there is but one will, one probate shall be sufficient (*o*).

[68] Where probate of the will of a married woman is granted to her executor, if he be not her husband, it is limited to the property, over which she had a disposing power : and the instrument from which such power is derived must be produced ; unless the husband, either in person or by proxy, consent to a general probate's being granted to her executor.

If a will be limited to any specific effects of a testator, the probate shall also be limited, and an administration *cæterorum* granted.

The interest vested by the will of the deceased in the executor may, if he take out probate, be continued and kept alive by the will of the same executor, so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself (*p*), and may be directly so named in legal proceedings (*q*). For the power of an executor is founded on the special confidence, and actual appointment of the deceased. Such executor, therefore, may transmit that power to another in whom he has equal confidence. And, so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator, in however numerous a succession. Nor is a [69] new probate of the original will in any of the subsequent stages requisite (*r*).

If there be several co-executors, and they all prove, the interest goes only to the executor of the last survivor ; and although such survivor refused to prove in the lifetime of the other executors, he may take out probate after their death ; and in that case the interest will be equally transmitted to his executor. But if such surviving executor renounce after their death, administration shall be granted, and then his executor will have no title to the original executorship (*s*).

If A. appoint B. and C. his executors, and die, and B. make J. S. his executor, and die, and afterwards C. dies intestate ; the executor of B. shall not be the executor of A., because the executorship vested solely in C. as survivor ; and as he died intestate, administration must be taken out to A. (*t*).

Wills which concern the personal estate only, are subject to the jurisdiction of the ecclesiastical courts (*u*).

Where the will respects lands merely, the spiritual court ought

(*n*) Vid. supr. 36.

(*o*) 3 Bac. Abr. 30. Off. Ex. 13.

(*p*) 2 Bl. Com. 506. Com. Dig. Admon. B. 6. 11 Vin. Abr. 63, 90, 107. Off. Ex. Suppl. 140. Plow. 525. Shep. Touch. 461.

(*q*) Com. Dig. Admon. G. 1. Powley and Sear's Case, Leon. 275.

(*r*) Wankford v. Wankford, 1 Salk. 309.

(*s*) 11 Vin. Abr. 68, 69, 114. Wankford v. Wankford, 1 Salk. 307. House v. Lord Petre, 311. Pawlet v. Freak, Hard. 111. Com. Dig. Admon. B. 1.

(*t*) 11 Vin. Abr. 38. Off. Ex. 191.

(*u*) 4 Burn. Eccl. L. 195.

[70] not to grant probate; and if there be a suit to compel it, a prohibition will lie (*v*).

But when the will is of a mixed nature, that is, relates both to real and personal property, the probate of it shall be entire in the spiritual court (*w*).

A will may be proved with a reservation as to a particular legacy. And in such case, if there be a decree against such legacy as a forgery or interpolation in the ecclesiastical court, the will shall be engrossed without it, and so annexed to the probate (*x*).

The will of a party who has been long absent from this country may be proved, if he be generally understood to be dead, and the executor will take upon himself to swear that he believes him to be so (*y*).

If the executor named in the will be unknown or concealed, administration may, after due process, be granted till he appear and claim the probate (*z*).

[71] If the will be lost, two witnesses, superior to all exception, who read the will, prove its existence after the testator's death, remember its contents, and depose to its tenor, are sufficient to establish it (*a*).

So, where the testator had delivered his will to A. to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and in part illegible; on proof of the substance of the will by the joining of the pieces, and the memory of witnesses, the probate was granted (*b*).

A will is to be construed by the court without regard to the instructions given for preparing it (*c*).

If the testator resided in Scotland, and left effects there and in England, the will is proved in the first instance in the court of great sessions in Scotland, and a copy duly authenticated being transmitted hither, it is proved in the prerogative court, and deposited as if it were an original will.

So in such case, if the testator resided in Ireland, the will is proved in the spiritual court of that country; or if in the East or West Indies, in the probate court there, and a copy transmitted, proved, and deposited in the same manner.

Where the testator was resident in England, not merely as a visitor, and has left property in the plantations, the judge of probate [72] in the plantations is bound by a grant of probate by the prerogative court here, and ought to make a similar grant to such grantee (*d*).

(*v*) 4 Burn. Eccl. L. 195. Netter v. 6. s. 13.

Brett, Cro. Car. 396. Habbergham v. Vincent, 2 Ves. jun. 230.

(*z*) 4 Burn. Eccl. L. 202. Roll. Abr. 997. and vide infr.

(*w*) Netter v. Brett, Cro. Car. 396. 11 Vin. Abr. 57. 60. 117. Partridge's Case, 2 Salk. 552. 3 Salk. 22.

(*a*) 4 Burn. Eccl. L. 209.

(*x*) 4 Burn. Eccl. L. 209. Plume v. Beale, 1 P. Wms. 388.

(*b*) Off. Ex. Supp. 215. 7 Bac. Abr. 320. in note.

(*y*) Off. Ex. Supp. 63. Swinb. Part

(*c*) Murray v. Jones, 2 Ves. & Bea. 318.

(*d*) Burn v. Cole, Amb. 115

If a will be made in a foreign country, disposing of goods in England, it must be proved here (e). (1) But if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient. And the executor may plead such matter to a bill filed against him by the administrator, for an account of the deceased's personal estate (f).

If a will be in a foreign language, the probate is granted of a translation of the same by a notary public.

SECT. IX.

Of caveats, revocation of probates, and appeals.

WHEN the will is opposed, it is the practice to enter a caveat in the spiritual court to prevent the probate. And it is said that, by the rules of that court, the caveat shall stand in force for three months, and that, while it is pending, probate cannot be granted; [73] but whether the law recognizes a caveat and allows it so to operate, or whether it does not regard it as a mere cautionary act by a stranger to prevent the ordinary from committing a wrong, is a point on which the judges of the temporal courts have differed (g).

Probate of a will is suspended by appeal, (2) but it cannot be stayed at the suit of a creditor, till a commission of appraisement issued be returned (h); for by the statute 21 H. 8. c. 5. the probate is to be granted with convenient speed, without any frustratory delay.

If a probate have been granted by the wrong jurisdiction, it is cause of reversal, or nullity, according to the distinction before stated (i).

So if the will be fraudulently proved, either in the common form, that is to say, by the oath of the executor, or more solemnly by the examination of witnesses, on such fraud being shewn, the spiritual court will revoke the probate. So also it may be vacated on proof of a revocation of the will on which it was granted, or of the making of one subsequent (k). And where probate has been granted of the will of a person *supposed* to be deceased, upon application to the executor by motion, the judge will by interlocutory decree revoke the probate so granted in error, and upon petition of the party will decree the will and cancelled probate to be delivered out to him (l).

(e) 11 Vin. Abr. 58. Vid. infr.

L. 230. Rex v. Bettesworth, Stra. 857.

(f) 11 Vin. Abr. 59. 69. Jauncy v. Sealey, 1 Vern. 397.

(i) Off. Ex. 48. Vid. supr. 53.

(k) Ibid. 48.

(g) 3 Bac. Abr. 41. Offley v. Best, 1 Lev. 186.

(l) In re Charles James Napier, 1 Phill. Rep. 83.

(h) 11 Vin. Abr. 63. 4 Burn. Eccl.

(1) See *Ante*, page 2, note (2). See *Crofton v. Ilkley*, 4 Greenl. Rep. 134. *Trecothick v. Austin*, 4 Mason's Rep. 16.

(2) 4 Mason's Rep. 25.

An appeal (*m*) in regard to probates, by statute 24 *H. 8. c. 12*, [74] lies from the court of the archdeacon, or his official (if the matter be there commenced), to the bishop of the diocese; and by virtue of the same statute, from the bishop diocesan, or his commissary, to the archbishop of the province, within fifteen days next after sentence. When the cause is commenced before the archdeacon of the archbishop, or his commissary, by the same statute there may be an appeal within the same period to the court of arches or audience of the archbishop; and from the court of arches or audience, within fifteen days next after sentence given to the archbishop himself; and in case the king himself be a party in such suits, the appeal shall be, within fifteen days next after sentence given to all the bishops of the realm, in the upper house of convocation assembled. By that statute, and also by statute 25 *H. 8. c. 19*, appeals to the pope are prohibited, and by the latter statute are given from the archbishop's court to the king in chancery, where a commission shall be awarded under the great seal, to certain persons to be named by the king for the determination of the appeals; and those commissioners are called delegates, inasmuch as they are delegated by the king's commission. And further, although this last cited statute declares the sentence of the delegates definitive, the king, on complaint, to him made, may grant a commission of review to revise the sentence of the delegates (*n*); because the pope, as supreme head by the cannon law, used to grant [75] such commission; and such authority, as the pope heretofore exercised, is now annexed to the crown by statute 26 *H. 8. c. 1*. and 1 *Eliz. c. 1*. But it is not matter of right, which the subject may demand *ex debito justitiæ*, but merely a matter of favour, which is never granted but under special circumstances (*o*).

Before revocation of a probate, the court will not grant a new one (*p*).

Where probate granted by the special court is affirmed on an appeal to the arches or delegates, the usage is to send the cause back. But when the first sentence is reversed, the court below shall be ousted of its jurisdiction, and the court which reverses it shall grant probate *de novo* (*q*).

SECT. X.

The effect of a probate.—Loss of the same—What is evidence of probate.—Effect of its revocation.

THE probate thus passed, although it does not confer, yet authenticates the right of the executor, for courts of law or equity

(*m*) Com. Dig. Prerogative.

(*p*) 4 Burn. Eccl. L. 193. Rains v.

(*n*) Off. Ex. Suppl. 127. 129. 3 Bl. Com. 64—67.

Com. of Dioc. of Canterb., 7 Mod. 146.

(*q*) 11 Vin. Abr. 76. Com. Dig. Ad-

(*o*) 3 Bl. Com. 67. *Matthews v. Warner*, 4 Vcs. jun. 205.

mon. B. 2. 2 Roll. Abr. 233.

take no judicial notice of any executor until he has proved the will. But it shall have relation to the time of the testator's death (*r*).

[76] If the will be proved in common form, it may at any time within thirty years be disputed; if in the more formal mode, and all persons interested are made parties to the suit, and there be no proceedings within the time limited for appeals, it is liable to no future controversy (*s*).

So long as the probate remains unrevoked, the seal of the ordinary cannot be contradicted, for the temporal court cannot pass a judgment respecting a will in opposition to that of the ecclesiastical court (*t*); and therefore if a probate under seal be shewn, evidence will not be admitted that the will was forged, or that the execution of it was procured by fraud, or that the testator was *non compos mentis*, or that another person was executor; for these are points which are exclusively of spiritual cognizance; but it may be shewn that the seal was forged, or that there were *bona notabilia*, for such evidence is no contradiction to the seal, but admits, and avoids it (*u*).

Such then being the nature of a probate, inasmuch as it is a judicial act of the court having competent authority; and is conclusive till it be repealed, and a court of common law cannot admit evidence to impeach it; it was determined in a recent case, in opposition to some old decisions (*v*), that payment of money to an executor who had obtained probate of a forged will, was a discharge to the debtor of the intestate, although the probate were afterwards revoked, and administration granted to the next of kin (*w*). (1)

And on the same principle it is holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried; and it is the practice to postpone the trial till that court has given sentence (*x*).

But a payment of money under probate of a supposed will of a living person would be void, because in such case the ecclesiastical court has no jurisdiction: and the probate can have no effect. (2) The power of the ordinary extends only to the proving of wills of persons deceased (*y*).

Where the probate is lost, the spiritual court never grants a second, but merely an exemplification of the probate from its own

(*r*) 11 Vin. Abr. 205. Off. Ex. 49. Henslow's case, 9 Co. 38. Comber's case, 1 P. Wms. 767. Hudson v. Hudson, 1 Atk. 461. Ca. in Ch. 2 pl. 56. Smith v. Milles, 1 T. Rep. 480. Rex v. Netherseal, 4 T. Rep. 260.

(*s*) 4 Burn. Eccl. L. 207. Godolph. 62.

(*t*) House v. Lord Petre, 1 Salk. 311. Griffiths v. Hamilton, 12 Ves. jun. 298. See also 1 P. Wms. 388. 518. in note.

(*u*) Marriott v. Marriott, Stra. 671. 672. 4 Burn. Eccl. L. 196.

(*v*) 1 Roll. Abr. 919. Anon. Com. Rep. 152. Vid. 11 Vin. Abr. 89.

(*w*) Allen v. Dundas, 3 Term Rep. 125.

(*x*) 3 Bac. Abr. 34. Rex v. Vincent, 1 Stra. 481. Rex v. Rhodes, 2 Stra. 703.

(*y*) Allen v. Dundas, 3 Term Rep. 130.

(1) 15 Serg. & Rawle, 42.

(2) 15 Serg. & Rawle, 42, *contra*.

records, and such exemplification is evidence of the will having been proved (z).

The copy of the probate of a will of a personal property is evidence, inasmuch as the probate is an original taken by authority, and of a public nature (a).

The register's book, or, as it is sometimes styled, the ledger-book, in the spiritual court, is evidence that there was such will, in case of its being lost (b).

A copy of the ledger-book seems also to be sufficient proof for the same purpose; since such book is a roll of the court, and therefore a copy of it is not a copy of a copy, as hath been erroneously supposed (c).

If issue be taken on a probate of a will, it shall be tried by a jury (d).

The probate, or, as it is sometimes called, the letters testamentary, may be revoked either on a suit by citation, or on appeal to reverse a sentence by which they are granted; and, in case of revocation, all the intermediate acts of the executors shall be void. (1)

But where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies without notice of the revocation, she was allowed those payments in equity; but leases which she had granted were ordered to be set aside (e).

Where B., a married woman, who was the sole executrix of her late husband A., made a will *merely* executing a power given to her by a marriage settlement, but appointed C. executrix *generally*, and the ecclesiastical court granted probate of her will in the *general* form; it was held, that the general probate of the will of B. transmitted to C. the representation of A. without an administration *be bonis non* (f).

(z) *Shepherd v. Shorthose*, Stra. 412.

4 Burn. Eccl. L. 219.

(a) 3 Salk. 154. *Hoe v. Nathorpe*,
I.d. Raym. 154. Law of Ni. Pri. 245,
246. 4 Burn. Eccl. L. 219.

(b) 4 Burn. Eccl. L. 218. *St. Legar*
v. Adams, Lord Raym. 731.

(c) Law of Ni. Pri. 246.

(d) Off. Ex. Suppl. 9. Case of Abbot
of Strata, 9 Co. Rep. 31.

(e) 3 Bac. Abr. 50. 1 Chan. Ca. 126.

(f) *Barr v. Carter*, 2 Cox's Rep.
429.

(1) *Contra*, Appeal of *R. Peebles*, 15 Serg. & Rawle, 39, where the doctrine in the text is denied. See *Ford v. Gardner*, 1 Hen. & Munf. 72, as to the right in *Virginia* of any one having an interest, and who did not appear to contest it before the ordinary, to impugn, within seven years, the validity of a probate by bill in equity. Appearance and contesting the probate will not bar the right to file a bill, if there be any ground of fraud unknown to the party at the time of the probate, *Ibid*.

[80] CHAP. III.

OF THE APPOINTMENT OF ADMINISTRATORS.

SECT. I.

*Of general administrations,—origin thereof,—who entitled.—
Of consanguinity.*

IN case a party makes no testamentary disposition of his personal property, he is said to die intestate (*a*) ; the consequences of which are now to be considered.

In ancient times the king was, on such event, entitled to take possession, by his officers, of the effects, as the *parens patriæ*, and general trustee of the kingdom, in order that they might be applied in the burial of the deceased, in the payment of his debts, and in a provision for his wife and children ; or if none, then for his next of kin (*b*). This prerogative was most probably exercised in the county court ; it was also delegated as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts, or as we have seen (*c*), to grant [81] probate of their wills, in case they have made any disposition (*d*).

This power was afterwards vested by the crown in the prelates, who, on a notion of their superior sanctity, were, by the superstition of the times, conceived capable of disposing of the property most for the benefit of the deceased's soul (*e*). The effects were therefore committed to the ordinary, and he might seize and keep them without wasting, and after the *partes rationabiles*, or two thirds belonging to the wife and children were deducted (*f*), might give, alien, or sell the remainder at his pleasure, and dispose of the money in pious uses. If he did otherwise, he violated the trust reposed in him as the king's almoner within his diocese (*g*). The jurisdiction of proving wills of course fell into the same channel, since it was thought reasonable that they should be proved to the satisfaction of him whose right of distribution they effectually superseded (*h*).

But his conduct did not justify the presumption which had been thus formed in his favour. The trust so confided to him, he did

(*a*) 2 Bl. Com. 494.(*b*) 2 Bl. Com. 494. 9 Co. 38 b.(*c*) Vid sup. 50.(*d*) 2 Bl. Com. 494. 9 Co. 37 b.(*e*) Perkins, sect. 486 Plowd. 277.

9 Co. 38 b.

(*f*) 2 Bl. Com. 491. 495, 516. 2 Inst. 33.(*g*) Plowd. 277.(*h*) 2 Bl. Com. 494

not very faithfully execute (*i*). He converted to his own use, under the name of 'church and poor, the whole of such residue, [82] without even paying the deceased's debts. To redress such palpable injustice, the statute of *Westminster* 2. or the 13 *E.* 1. c. 19. was passed; by which it is enacted, that the ordinary is bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors are bound, in case the deceased has left a will; an use, as Mr. Justice *Blackstone* styles it, more truly pious than any requiem, or mass for his soul (*k*).

Although the ordinary were now become liable to the intestate's creditors, yet the residue, after payment of debts, continued in his hands, to be applied to whatever purposes his conscience might approve. But as he was not sufficiently scrupulous to prevent the perpetual misapplication of the fund, the legislature again interposed, in order to divest him and his dependents of the administration. The stat. 31 *E.* 3. c. 11. therefore provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and they are thereby put on the same footing in regard to suits, and to accounting, as executors appointed by will (*l*).

Such is the origin of administrators. They are the officers of the ordinary, appointed by him in pursuance of the statute, which selects the next and most lawful friends of the intestate. But the [83]stat. 21 *H.* 8. c. 5. (1) allows the ecclesiastical judge a little more latitude, and empowers him to grant administration either to the widow or next of kin, or to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, in case they apply, gives him his election to accept whichever he pleases. (2)

(*i*) Ibid. 491. 495.

(*k*) Ibid. 495.

(*l*) 2 Bl. Com. 495, 496. 3 Bac. Abr. 54. Raym. 498.

·(1) That part of this statute only is in force (in *Pennsylvania*) which relates to the persons to whom administration is granted. Report of the Judges, 3 Binn. 618. Roberts' Dig. Brit. Statutes, 254.

(2) In *Pennsylvania*, by the provisions of the first section of the Act of 19th April 1794, entitled "An act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," (Purd. Dig. 372, 3 Dall. Laws, 521, 3 Sm. Laws, 143,) "The Register for the probate of wills, and granting letters of administration for the city and county of Philadelphia, and of the several counties of this state, respectively, and their deputies, having power to grant letters of administration of the goods and chattels of persons dying intestate, within this commonwealth, shall, upon their granting letters of administration, take bonds with two or more sufficient sureties (respect being had to the value of the estate) in the name of the register, [to be taken in the name of *The Commonwealth*, by the 11th sect of the act of 4th April, 1797, Purd. Dig. 382,] with the conditions in manner and form following, viz. 'The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make, or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited, into the

Letters of administration, then, must be granted by the ordinary to such persons, as the statutes 31 *E. 3.* & 21 *II. 8.* point out (*m*); that is, according to the former statute, to the next and most lawful friends of the intestate; according to the latter, to the widow, and next of kin, or both, or either of them.

What parties fall within the first description, it was the province of the courts of common law to determine (*n*); and they have interpreted such friends to mean in the first place the husband, if he were not entitled at common law, and secondly, the next of blood, under no legal disabilities (*o*).

First, the ordinary is bound to grant administration of the effects of the wife to the husband (*p*).

Various opinions have indeed been held with regard to the husband's title to administer. Some have maintained that he has no [84] such exclusive right, either at common law, or by virtue of the statutes; but that the ordinary may refuse the administration to

(*m*) 2 Bl. Com. 504.

(*o*) 2 Bl. Com. 496. 9 Co. 39 b.

(*n*) 3 Bac. Abr. 54. 11 Vin. Abr. 93.

(*p*) 11 Vin. Abr. 86. Blackborough

Thomas v. Butler, 1 Ventr. 218.

v. Davis, 1 P. Wms. 44.

'register's office in the county of —, at or before the — day of — next ensuing, and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer, according to law; and further, do make or cause to be made, a true and just account of his said administration, at or before the — day of —, and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the orphan's court of the county, where the said administration is granted, shall deliver and pay unto such person or persons respectively, as the said orphan's court, by their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said register's office, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration, approbation of such testament being first had and made in the said register's office, then this obligation to be void and of none effect, or else to remain in full force and virtue.' Which bonds are hereby declared to be good to all intents and purposes, and pleadable in any courts of justice; and the said orphan's court in the respective counties shall and may, and are hereby enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, after all debts and funeral and just expenses of every sort first allowed and deducted, amongst the wife and children, or children's children, if any such be, or otherwise to the next kindred to the person deceased, in equal degree, or legally representing their stocks, to every one his right, according to the rules and limitations hereafter set down, and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of the laws of this commonwealth, saving to every person or persons, supposing him or themselves aggrieved, their right to appeal: *Provided*, That the administrators be bound to furnish the inventory within one month, and to adjust and settle his accounts within one year."

him; and may elect to grant it to the next of kin of the wife (*g*). By others, it has been asserted, that he is entitled under the equity of the stat. of the 21 *H.* 8. whereby the ordinary is directed to grant administration of the husband's effects to the wife, or next of kin, or to either (*r*). By a third class, it has been insisted, that although the husband have not been expressly named in the stat. 31 *E.* 3. nor does he answer the description of next of kin to the wife, yet he is included under the denomination of the next and most lawful friend of the intestate; and that thus he supports his claim, not on the common law, nor, as described *eo nomine*, by the statute, but as comprehended within its general provision (*s*). By a fourth, it is alleged, and the doctrine is recognised, in a recent case, by Lord Loughborough, C. (*t*), that he is entitled at common law, *jure mariti*, and that his right is not derived from any of the statutes, but, on the contrary, is supposed by them, and exists independently of them all. However, to speculate on these points is useless to the present purpose, since the husband's right [85] to administer, on whatever foundation, is now beyond all question established. (1)

The stat. 29 *Car.* 2. c. 3. contains a clause, that the statute of distributions, the 22 & 23 *Car.* 2. c. 10. hereafter to be discussed, shall not prejudice such title of the husband, under an apprehension that it might be considered to be thereby affected. And though a marriage was voidable as being within the prohibited degrees, but not declared void in the lifetime of the parties, the marriage is valid for all civil purposes, and the husband is entitled as a civil right to administration of her effects (*v*).

(*g*) *Johns v. Rowe*, Cro. Car. 106.

v. Gorges, 1 Ves. jun. 49.

(*r*) 11 Vin. Abr. 84. in note.

(*t*) *Watt v. Watt*, 3 Ves. jun. 246,

(*s*) *Fawtry v. Fawtry*, 1 Salk. 36. 11 Vin. Abr. 73. 84. in note. 116. *Blackborough v. Davis*, 1 P. Wms. 44. 4 Burn. Eccl. Law, 235. Vid. *Fettiplace*

247. Vid. also Com. Dig. Admon. B. 6. 282. 2 Bl. Com. 515. 4 Co. 51 b. Roll. Abr. 910. 4 Burn. Eccl. L. 264. (*r*) *Elliott v. Gurr*, 2 Phill. Rep. 16.

(1) By the 5th section of the Act of 21st *March*, 1772, entitled "An Act for preventing frauds and perjuries," (Purd. Dig. 371, 1 Dall. Laws, 641, 1 Sm. Laws, 390) it is provided, "that the Act entitled 'An Act for better settling of intestates' estates,' passed &c. shall not be construed to extend to the estates of *feme-coverts* that shall die intestate, but their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." The Act "for better settling intestates' estates" was repealed by the act of 19th April, 1794. (Purd. Dig. 372. 3 Dall. Laws, 521. 3 Sm. Laws, 143.)

And upon the death of a husband who has survived his wife, and administered upon her estate, *his* executor (or it seems his *administrator*) is entitled to be administrator *de bonis non* of the wife, in preference to her next of kin, or (it would seem) to the husband's residuary legatee. *Hendren v. Colgin*, 4 Munf. Rep. 231. So if the husband survive the wife, and die without administering on her property, or before he had completed the administration, and the wife's next of kin administer, such administrator becomes trustee for the representatives of the husband. *Stewart v. Stewart*, 7 Johns. Cha. Rep. 244. *Whitaker v. Whitaker*, 6 Johns. Rep. 117.

Such is the general right of the husband to the administration of the wife's effects; but this right may, in certain cases, be controlled or varied (*u*). If the husband part with all his interest in his wife's fortune, he shall not be entitled to the administration; as, where a wife had a power to make a will, and dispose of her whole estate, and though, strictly speaking, she made no will, but rather an appointment capable of operating only in equity, the court held that it was for the spiritual jurisdiction to determine to whom to grant administration, and refused to interpose in favour of the husband (*w*).

So where a feme covert, by virtue of her power to dispose of her estate, devised a term for years to J. S., administration was granted to the devisee (*x*). (1)

[86] On the other hand, where the return to a *mandamus* to grant administration to a husband stated that, by articles before marriage, it was agreed that the wife should have power to make a will, and dispose of a leasehold estate, and pursuant to this power she had made a will, and appointed her mother executrix, who had duly proved the same, it was objected that she might have things in action not covered by the deed, and that the husband was at all events entitled to an administration in respect to them, though equity would control it in respect to the lease; the court allowed the objection, and granted a peremptory *mandamus* (*y*).

In case of a limited probate, granted to the executor of a married woman as above mentioned (*z*), the husband is entitled to administration of the other part of her property, which is called an administration *cæterorum*.

Secondly, the ordinary is to grant administration of the effects of the husband to the widow or next of kin; but he may grant it to either, or both, at his discretion (*a*). (2) If the widow renounce administration, it shall be granted to the children or other next of kin of the intestate, in preference to creditors.

[87] The ordinary may grant administration *quoad* part to the wife, and as to the other part, to the next of kin; for in such case

(*u*) 3 Bac. Abr. 55. in note. Com. Rep. 143. S. C.

Dig. Admon. B. 6. vid. infr.

(*y*) 4 Burn. Eccl. L. 232. Rex v.

(*w*) 4 Burn. Eccl. L. 232. Rex v. Bettesworth, Stra. 891.

Bettesworth, Stra. 1111.

(*z*) Vid. supr. 68.

(*x*) 11 Vin. Abr. 87. Marshall v.

Frank, Prec. Chan. 480. Gilb. Eq.

(*a*) Vid. 11 Vin. Abr. 92. Anon. Stra. 552.

(1) The person entitled to the estate is entitled to the administration also, as well *de bonis non* as originally, *Cutchin v. Wilkinson*, 1 Call's Rep. 3; and therefore where the personal property of the wife was so settled by deed, before marriage, that upon her decease intestate in her husband's lifetime, her trustee was to convey the same to her legal heirs, it was held, that her nearest blood relation was, in such event, entitled to the administration of her estate in preference to her husband. *Bray v. Dudgeon*, 6 Munf. 132.

(2) And natural children, who were residuary legatees, have been preferred to the widow, in a case where the executors named in the will refused to act. *Gowan v. Gowan*, 1 Harr. & M'Ken. 346.

there can be no ground to complain, as the ordinary is not bound to grant it exclusively to either (*b*). But the administration is so much a claim of right, that a *mandamus* will be issued by the court of K. B. in favour of the party entitled to enforce it (*c*).

It now becomes necessary to inquire who are such next of kin as shall be thus entitled.

Consanguinity or kindred is defined to be *vinculum persquarum ab eodem stipite descenditum*, the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral (*d*).

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between J. S. the *propositus* in the table of consanguinity, and his father, grandfather, great-grandfather, and so upwards in the ascending line; or between J. S. and his son, grandson, and great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of J. S. is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great grandsire and great [88] grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains as well in the civil and canon as in the common law.

Thus this lineal consanguinity falls strictly within the definition of *vinculum personarum ab eodem stipite descenditum*, since lineal relations are such as descend one from the other, and both of course from the same common ancestor (*e*).

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but differing in this, that they do not descend the one from the other.

Collateral kinsmen are, then, such as lineally spring from one and the same ancestor, who is the *stirps* or root, *stipes* or common stock, from which these relations are branched out. As if J. S. have two sons who have each issue; both of these issues are lineally descended from J. S. as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from one common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

[89] Thus the very being of collateral consanguinity consists in this descent from one and the same common ancestor. A. and his brother are related, because both are derived from one father. A. and his first cousin are related, because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-

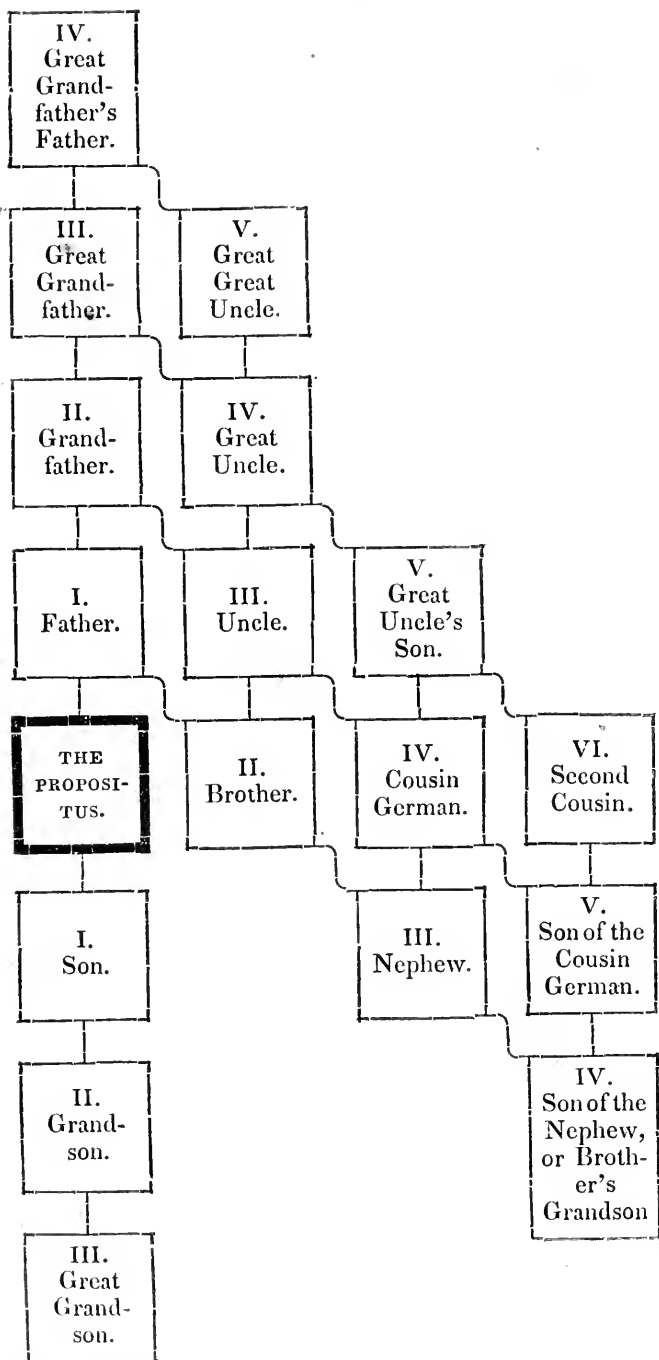
(*b*) 11 Vin. Abr. 71. 3 Bac. Abr. 55. 8 East. 408.

Com. Dig. Admon. B. 6. Fawtry v. (*d*) 2 Bl. Com. 202.

Fawtry, 1 Salk. 36. Vid. infr.

(*e*) Ibid. 203, 204.

(*c*) Rex v. Inhabitants of Horsley,





grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen are derived. And as from one couple of ancestors the whole race of mankind is descended, it necessarily follows that all men are in some degree related to each other (*f*).

The mode of calculating the degrees in the collateral line is not that of the canonists adopted by the common law in the descent of real estates, but conforms to that of the civilians, and is as follows; to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending (*g*); or in other words, to take the sum of the degrees in both lines to the common ancestor (*h*).

Thus, for example, the *propositus* and his cousin-german are related in the fourth degree. We ascend first to the father (*i*), which [90] is one degree, and from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning to the son of the nephew, or brother's grandson, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother we descend to the nephew which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree (*k*).

Of the kindred, those, we must recollect, are to be preferred, who are the nearest in degree to the intestate; (1) but from among persons of equal degree, in case they apply, the ordinary has the power of making his election (*l*).

The court never forces a joint administration; and where the option was between two persons in equal degree of relationship, one of whom had been twice a bankrupt, the court rejected the claim of the latter, and condemned him in costs (*m*).

But if there be no material objection on one hand, or reasons of preference on the other, the court in its discretion, (2) puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate (*n*).

Of the next of kin, then, first the children, and, on failure of

(*f*) 2 Bl. Com. 204, 205. 504.

(*k*) 4 Burn. Eccl. L. 355. Black.

(*g*) Ibid. 207. 504. Mentney v. Petty, Pre. in Ch. 593.

Desc. 41, 42.

(*h*) Ibid. 12th edit. note (4).

(*l*) 11 Vin. Abr. 114, 115. Com. Dig. Admon. B. 6.

(*i*) See the table of consanguinity prefixed, in which the degrees of collateral consanguinity are computed as far as the sixth.

(*m*) Bell v. Timiswood, 2 Phill. Rep. 22.

(*n*) Budd v. Silver, 2 Phill. Rep. 115.

(1) The daughter is to be preferred, in granting administration, to the son of the eldest son of the intestate. *Lee v. Sedgwick*, 1 Root's Rep. 52.

(2) See *New's Case*, 9 Serg. & Rawle, 186.

them, the father of the deceased, or if he be dead, the mother, (1) is entitled to administration: the parents indeed, as well as the children, are of the first degree, but the children are allowed the preference (*o*); then follow brothers (*p*); but *primogeniture* gives no [91] *right* to a preference (*q*); then grandfathers (*r*), and although they are both of the second degree, yet the former are first entitled; next in order are uncles or nephews (*s*), and lastly cousins, and the females of each class respectively (*t*). Relations by the father's side and the mother's, in equal degree of kindred, are equally entitled; for in this respect dignity of blood gives no preference (*u*). So the half blood is admitted to the administration as well as the whole (*v*), for they are the kindred of the intestate, and excluded from inheritances of land only on feudal reasons (*w*); therefore the brother of the half blood shall exclude the uncle of the whole blood (*x*); and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion (*y*).

If a feme covert be entitled, she cannot administer unless with the husband's permission (*z*), inasmuch as he is required to enter into the administration bond, which she is incapable of doing. But if it can be shewn by affidavit that the husband is abroad, or otherwise incompetent, a stranger may join in such security in [92] his stead. In either case the administration is committed to her alone, and not to her jointly with her husband (*a*); otherwise, if he should survive her, he would be administrator, contrary to the meaning of the act (*b*).

If it were committed to them jointly during coverture only it might perhaps be good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent; and therefore the effect of the grant seems in either case the same (*c*).

If the wife be the only next of kin, and a minor, she may elect her husband her guardian to take the administration for her use and benefit during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her.

(*o*) 11 Vin. Abr. 91, 92. 2 Bl. Com. 504. *cey*, 1 Ventr. 323, 424. *Earl of Winchester v. Norcliffe*, 1 Vern. 437.

(*p*) 11 Vin. Abr. 93.

(*q*) *Warwick v. Greville*, 1 Phill. Rep. 123.

(*r*) 11 Vin. Abr. 93. and in note Lord Raym. 684. Com. Dig. Admon. B. 6. *Blackborough v. Davis*, 1 Salk. 38.

(*s*) 2 Bl. Com. 505. *Stanley v. Stanley*, 1 Atk. 455.

(*t*) 2 Bl. Com. 505

(*u*) *Blackborough v. Davis*, 1 P. Wms. 53.

(*v*) 11 Vin. Abr. 91. *Smith v. Tra-*

(*w*) 2 Bl. Com. 505.

(*x*) 11 Vin. Abr. 85.

(*y*) 2 Bl. Com. 505.

(*z*) *Thrustout v. Coppin*, Bl. Rep. 801.

(*a*) 11 Vin. Abr. 85. 4 Burn. Eccl. L. 241. Com. Dig. Admon. D. Sty. 75.

(*b*) 3 Salk. 21.

(*c*) 11 Vin. Abr. 85. 4 Burn. Eccl. L. 241. Com. Dig. Admon. D. *Wankford v. Wankford*, 1 Salk. 305. Vid. *Thrustout v. Coppin*, Bl. Rep. 801.

The stat. 21 *II.* 8. has also expressly provided for another case than that of actual intestacy; namely, where the deceased has made a will, and appointed an executor, and such executor refuses to take out probate (*b*), in such an event the ordinary must grant administration *cum testamento annexo*, with the will annexed, and the duty of such grantee differs but little from that of an executor [93] (*c*). He is equally bound to act according to the tenor of the will.

So, if one of two executors prove the will and die, and then the other refuse, such administration shall be granted (*d*).

The ordinary cannot grant administration with the will annexed in which an executor is named, until he has either formally renounced his right to the probate, or neglected to appear on being duly cited to accept or refuse the same. So if several executors be named in the will, they must all refuse, or fail to appear on citation previous to the grant. After such administration the executor cannot retract his refusal during the lifetime of the administrator, but he may do so after the grant has ceased by the administrator's death (*e*).

A party, although otherwise entitled, may be incapable of the office of administrator on account of some disqualification in point of law. The incapacities of an administrator are not confined to such as have been enumerated in respect of executors, but comprise attainder of treason, or felony, outlawry, imprisonment, absence beyond sea, bankruptcy (*f*), and, in short, almost every [94] species of legal disability; for, by the express requisition of the statute, the ordinary is bound to grant administration to the next and most lawful friends of the intestate (*g*).

But coverture is no incapacity, nor is alienage, if qualified, as in the case of executors (*h*). Even an alien of the half blood may be appointed an administrator (*i*).

SECT. II.

Of the analogy of administrations to probates.

WHAT has been stated respecting the different jurisdictions relative to probates, of issuing a commission or requisition in case the party be in an ill state of health, or reside at a distance; of *bona notabilia*; of the ecclesiastical privilege of granting probate being personal, and not local (*a*); of its devolving on the archbishop where the party deceased was a bishop, and on the dean

(*b*) 4 Burn. Eccl. L. 228. 11-Vin. Abr. 78. 2 Inst. 397.

(*c*) 2 Bl. Com. 504.

(*d*) Vid. supr. 69.

(*e*) Vid. supr. 45.

(*f*) Co. 39 b. Com. Dig. Admon. B. 6. 4 Burn. Eccl. L. 233. 5 Bac. Abr. 36. in note.

(*g*) Com. Dig. Admon. B. 6. Fawtry v. Fawtry, 1 Salk. 36.

(*h*) Com. Dig. Admon. B. 6. Caroon's case, Cro. Car. 9. Anon. 1 Brownl. 31.

(*i*) 11 Vin. Abr. 94. Crooke v. Watt, 2 Vern. 126.

(*a*) 1 Burn. Eccl. L. 211.

and chapter in case of the death or suspension of the metropolitan or ordinary; of his being compelled by *mandamus* to grant [95] probate, unless he return a *lis pendens* (*b*); of caveats and appeals; of the power of the court of appeal to grant probate where the sentence is reversed (*c*); of probates being of unquestionable validity in courts of common law (*d*); of the register's book in the spiritual court being evidence where the probate is lost (*e*); and, if issue be taken thereon, of its being triable by a jury; applies equally to letters of administration.

SECT. III.

In regard to the acts of a party entitled previous to the grant.

ALTHOUGH an executor may perform many acts before he proves, yet a party can do nothing as administrator till letters of administration are issued, because the former derives his authority from the will, and not from the probate; (1) the latter owes his entirely to the appointment of the ordinary (*f*).

It has indeed been held that a party before administration may file a bill in chancery, although he cannot commence an action at law (*g*).

[96] But by stat. 37 *Geo.* 3. *c.* 90. *s.* 10. if a party administrator, and omit to take out letters of administration within six months after the intestate's death, he incurs the penalty of fifty pounds (*h*).

SECT. IV.

Practice in regard to administrations.

LETTERS of administration do not issue till after the expiration of fourteen days from the death of the intestate, unless, for special cause, as that the goods would otherwise perish, the judge shall think fit to decree them sooner (*a*). (2)

On taking out letters of administration, the party swears that the deceased made no will, as far as the deponent knows or be-

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| (b) 4 Burn. Eccl. L. 230. Com. Dig. Admon. B. 7. 11 Vin. Abr. 74. 202. 4 Inst. 335. | Case, 1 Lev. 101. |
| (c) 11 Vin. Abr. 76. Com. Dig. Admon. B. 2. 2 Roll. Abr. 233. | (f) 11 Vin. Abr. 202. 4 Burn. Eccl. L. 241. Wankford v. Wankford, Salk. 301. |
| (d) Tourton v. Flower, 3 P. Wms. 369. | (g) 4 Burn. Eccl. L. 242. Fell v. Lutwidge, Barnardist. 320. |
| (e) 4 Burn. Eccl. L. 248. Peaulie's | (h) Vid. supr. 43. 66. |
| | (a) 4 Burn. Eccl. L. 242. |

(1) See 15 Serg. & Rawle, 42.

(2) The practice in *Pennsylvania* is, unless a caveat be filed, to grant letters of administration immediately upon the decease of the intestate, if applied for. The Register, however, will revoke the grant, if any person having a paramount right make application within fourteen days from the death of the intestate.

lieves, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts, as far as the same will extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by the court, and to render a just account of his administration when lawfully required.

[97] And, pursuant to the stat. 21 *H. 3. c. 5.* and the 22 & 23 *Car. 2. c. 10.*, he enters into a bond with two or more sureties conditioned for the making or causing to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, which have or shall come to the hands, possession, or knowledge of the administrator, or into the hands or possession of any other person or persons for him; and for exhibiting the same into the registry of the spiritual court at or before the end of six months; and for well and truly administering, according to law, such goods and chattels; and further, for the making a true and just account of his administration at or before the end of twelve months; and for delivering and paying all the rest and residue of the goods, chattels, and credits which shall be found remaining on his accounts (the same being first examined and allowed of by the judge of the court), unto such person or persons respectively as the judge by his decree or sentence, pursuant to the statute of distribution, shall limit and appoint; and if it shall thereafter appear that any will was made by the deceased, and the executor therein named exhibit the same into the court, making request to have it allowed and approved accordingly, for the administrator's rendering and delivering, on being thereunto required (approbation of such testament being first had and made), the letters of administration in the court. (1)

[98] When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; so different is this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui prior est tempore, potior est jure,*" applies in the former but not in the latter instance (b).

SECT. V.

Of special and limited administrations.

THERE are also various classes of administrations, which, although not founded on the letter of any of the above mentioned

(b) 11 Vin. Abr. 116. Thomas v. Butler, 1 Ventr. 218.

(1) See the Act of 19th April, 1794, (Purd. Dig. 372, 3 Dall. Laws, 521, 3 Sm. Laws, 113,) *Ant.*, page 82, note (2).

statutes, fall within their spirit and intendment (*c*). As, if no executor be named in the will, the clause for such appointment being wholly omitted, or where a blank is left for his name, administration shall be granted with the will annexed, when it shall be proved in the same manner as in the case of an executor (*d*).

Or if the executor die in the lifetime of the testator (*e*), or if the [99] testator name the executor of B. to be his executor, and die in the lifetime of B., for till B.'s death he is in effect intestate (*f*).

Or if he name an executor to have authority after a year from his death, for during the year there is no executor (*g*): and in such cases administration shall be granted in the interval.

So, if the executor be incapable of the office, the party is said to die *quasi intestatus*, and the ordinary must grant administration.

So, if an executor is afterwards disabled from acting, as if he become lunatic, then, on the same principle of necessity, there shall be a grant of a temporary administration with the will annexed (*h*).

So, in all the above-mentioned instances, if there be a residuary legatee, administration is in general granted to him in exclusion of the next of kin, because in that case the next of kin hath no interest in the property, and the presumption of the statute, that the testator would have given it to him, cannot exist where such a legatee is appointed (*i*). [1] And even where there is no prospect of a residue, a residuary legatee is entitled to an administration *de bonis*, in preference to legatees and annuitants (*k*).

If several persons are entitled to the residue, it may be granted to any of them (*l*): and if it be thus granted, the other residuary legatees have no claim to a subsequent grant in the lifetime of the grantee.

[100] Such administration may be also granted, although it be uncertain whether there will eventually be a residue or not (*m*).

Of this species also is an administration *durante minoritate*, or during the infancy or minority of an executor, or a party entitled to administration (*n*).

A distinction exists in the spiritual court between an infant and a minor. The former is so denominated if under seven years of age, the latter from seven to twenty-one. The ordinary *ex officio* assigns a guardian to an infant. The minor himself nominates his

(*c*) Burn. Eccl. L. 217. 11 Vin. Abr. 24. Plowd. 271. Walker v. Woodlston, 2 P. Wms. 582, 583, 584.

(*d*) 11 Vin. Abr. 24. Com. Dig. Admin. B. 1. 2 Bl. Com. 512, 513, 518.

(*e*) 11 Vin. Abr. 25. Sty. 117.

(*f*) Com. Dig. Admin.

(*g*) Plowd. 272, 281 b.

(*h*) Fawc v. Lacey, 1 Salk. 75.

(*i*) Walker v. Woodlston, 2 P. Wms. 582.

(*j*) 11 Vin. Abr. 93, 94.

(*k*) Atkins v. Lady Barnard, 2 Phillimore, 316.

(*l*) Com. Dig. Admin. B. C. Taylor v. Sherre, 2 Jen. 172. 11 Vin. Abr. 94.

(*m*) Com. Dig. Admin. (B. C.) Thomson v. Butler, 2 Lev. 15. 1 Vent. 212. S. C.

(*n*) Com. Dig. Admin. (E) 11 Vin. Abr. 115.

guardian, who then is admitted in that character by the judge. According to the practice of the court, the guardianship in either case is granted to the next of kin of the child, unless sufficient objection to him be shewn, and administration is committed to such appointee for the use and benefit of the infant or minor.

Although, as we have seen (*n*), an administration during the minority of an infant executor was, antecedently to the stat. 38 *Geo.* 3. *c.* 87., determined on his attaining the age of seventeen, yet administration during the minority of an infant next of kin was always of force until his age of twenty-one; on the principle that the [101] authority of an administrator is derived from the stat. of 31 *Ed.* 3. *c.* 11., which admits only a legal construction, and therefore it was held he must be of the legal age of twenty-one before he is competent; and the executor comes in by the act of the party, and that he should be capable of the executorship at the age of seventeen was in conformity to other provisions of the spiritual law (*o*). And also, which was the more forcible reason, because the statute of distributions requires administrators to give a bond, which an infant is incapable of doing (*p*).

But now by the above-mentioned stat. 38 *Geo.* 3. *c.* 87., reciting, that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

If administration be granted to such guardian for the use and benefit of several infants, it ceases on the eldest attaining twenty-one.

If there be several infant executors, he who first attains the age [102] of twenty-one years shall prove the will, and the administration shall cease (*q*); but administration granted during the minority of several children will not expire on the marriage of one of them to a husband of full age (*r*). Nor, if an infant be executrix, shall it be determined by her taking a husband who is of age. Nor, if there be several infants, by the death of one of them (*s*).

If administration be granted *pendente minore ætate*, and the minor coming of age takes upon himself the administration, he must give security to the same amount, that the administrator did in the first instance (*t*).

If there be two executors, one of whom has attained the age of twenty-one years, and the other not, administration shall not be

(*n*) Supr. 31.

(*o*) 4 Burn. Eccl. L. 238, 239. Freke v. Thomas, Ld. Raym. 667. Com. Dig. Admon. (F.)

(*p*) 11 Vin. Abr. 100, 101. 3 Bac. Abr. 13. Harg. Co. Litt. 89 b. note 6.

(*q*) 1 Burn. Eccl. L. 249. L. of Test

473, 474.

(*r*) Jones v. Earl of Stafford, 3 P. Wms. 79.

(*s*) Jones v. Earl of Stafford, 3 P. Wms. 79. See vide Com. Dig. Admon. (F.) and 5 Co. 29 b.

(*t*) Abbott v. Abbott, 2 Phill. 578.

granted during the minority of him that is under age, because the former may execute the will (*t*).

According to other authorities (*u*), administration shall in such case be granted to the one executor during the minority of the other; but they are not warranted by modern practice.

This administration ought not to be committed to a party who is very poor, or in distressed circumstances, though the guardian or next of kin to the infant. When the court of chancery sees reason to think that such administrator will waste or misapply the effects of the intestate to the prejudice of the infant, for whom he is merely a trustee, that court will appoint a receiver of the personal estate, notwithstanding the grant of administration (*v*).

It has been held by some, that if such administrator continues the possession of the goods after the full age of the executor, he becomes an executor *de son tort*; but this is denied by others, and their opinion seems to be more correct, because he came to the possession of the goods lawfully (*w*).

In this class is also to be ranked administration *pendente lite*, while the suit is pending (*x*); and it may be granted, whether the suit respects a will or the right of administration (*y*). But it is never granted till a plea in the cause has been given in, and admitted.

Nor will the court of chancery, generally speaking, in such case interfere, and appoint a receiver during the litigation (*z*).

Of the same species also is administration grounded on the incapacity of the next of kin at the time of the intestate's death, arising, for instance, from attain or excommunication, madness, [104] or bankruptcy. If such incapacity be afterwards removed, such administration may be avoided (*a*).

To this description also must be referred administration granted at common law *durante absentia*, during the absence of the executor or next of kin from the kingdom; and it of course ceases on the appearance of the executor or next of kin, and his taking out probate or administration (*b*).

Under this head is also comprised administration granted to a creditor: such administration in general is warranted only by custom, and not by any express law, and may be granted where it is visible the next of kin cannot derive any benefit from the estate; but that is to be understood only where they refuse the grant, and

(*t*) 4 Burn. Eccl. L. 240. Pigot and Gascoigne's case, 1 Brownl. 46. 11 Vin. Abr. 99. Foxwist v. Tremaine, 1 Mod. 47. Hatton v. Mascal, 1 Lev. 181.

(*u*) 11 Vin. Abr. 97, 98, 99. 3 Bac. Abr. 13. Colborne v. Wright, 2 Lev. 239, 240. S. C. 2 Jo. 119. Smith v. Smith, Yelv. 130.

(*v*) 11 Vin. Abr. 100. Havers v. Havers, Barnard. 23, 24.

(*w*) 11 Vin. Abr. 98. 1 Sid. 57.

(*x*) 4 Burn. Eccl. L. 237.

(*y*) 3 Bac. Abr. 56. Walker v. Woolaston, 2 P. Wms. 575. 11 Vin. Abr. 105.

(*z*) 4 Burn. Eccl. L. 238. Knight v. Duplessis, 1 Ves. 325.

(*a*) Com. Dig. Admon. B. 1. Fawtry v. Fawtry, Salk. 36.

(*b*) Roll. Abr. 907. Lutw. 842. Slaughter v. May, Salk. 42. and vid. sup. 70.

the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor (*c*).

And by the aforesaid stat. 33 *Geo. 3. c. 87.*, if, after the expiration of twelve calendar months from the testator's death, the executor to whom probate had been granted shall be residing out of the jurisdiction of his majesty's courts, on application of any creditor, next of kin, or legatee, grounded on an affidavit, in the form therein specified, stating the nature of his demand and absence of the executor, such administration shall be granted. (1)

Of the same nature is administration committed by the ordinary, in default of all the above-mentioned parties, to such discreet person as he shall approve (*d*).

The jurisdiction of granting these administrations results from the ordinary's original power at common law, by which he may make the grant to whom he pleases; and therefore it is held, that he may in these cases, as not having been expressly provided for, impose on the grantee such terms as he may think reasonable (*e*).

Hence, where the executors renounced, and the residuary legatee moved for a *mandamus* to the ecclesiastical judge to be admitted to prove the will, and have administration with the will annexed, on shewing cause the court held that the matter was left to the election of the ordinary, and discharged the rule (*f*). (2)

[106] So, where a grandfather moved for a *mandamus* to such judge to grant him administration of the effects of his deceased son during the minority of his grandson, the court refused the application (*g*).

On the same principle, where, on the renunciation of the next of kin, several creditors apply for administration, though the court may prefer any one of them (*h*), yet, on the petition of the others, it will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own.

There may be also a limited or special administration committed to the party's care, namely of certain specific effects, as of a term for years and the like, and the rest may be committed to others, or for effects of the intestate in this country or place to one,

(*c*) 4 Burn. Eccl. L. 230. 2 Bl. Com. 505. Blackborough v. Davis, Salk. 38. Com. Dig. Admon. B. 6.

(*d*) 2 Bl. Com. 505.

(*e*) 4 Burn. Eccl. L. 237. 3 Bac. Abr. 13. Ld. Grandison v. Countess of Dover, Skin. 155. Walker v. Woollaston, 2 P. Wms. 582, 589, 590. Briers v. Goddard, Hob. 250. Thomas v. But-

ler, 1 Ventr. 219. Smith's case, Stra. 892. Rex v. Bettesworth, ib. 956.

(*f*) 4 Burn. Eccl. L. 231. Rex v. Bettesworth, Stra. 956. Com. Dig. Admon. B. 6.

(*g*) 4 Burn. Eccl. L. 231. Smith's case, Stra. 892.

(*h*) Harrison v. All Persons, 2 Phill. Rep. 249.

(1) See *Griffith v. Frazier*, 8 Cranch. 9. for the law of limited administrations.

(2) *Nearce's Case*, 9 Serg. & Rawle, 186.

and for effects in that country or place to another ; and as well in general cases, as in the case above stated, of the wife, and next of kin (*h*). But several administrations cannot be granted in respect of one and the same thing; as a house, or a bond, or any other debt. For it would be absurd that two persons should have a distinct right to an individual chattel, or *chose in action* (*i*). In respect however to creditors, such several administrators are all considered [107] as one person, and may be sued accordingly (*k*).

Administration also may be granted on condition, as where a former grantee is outlawed, and in prison beyond sea, it may be committed to another, but so as, if the first grantee shall return, he shall be entitled to administer (*l*).

The ordinary also, in default of persons entitled to the administration, may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and thus assume the office of an executor or administrator in respect to the collecting of them ; but the grantee of such letters cannot sell the effects without making himself an executor *de son tort*. The ordinary has no such authority, and therefore he cannot confer it on another (*m*).

If a bastard, who, as *nullius filius*, hath no kindred, or any other person having no kindred die intestate, and without wife or child, it hath formerly been holden that the ordinary could seize his goods, and dispose of them to pious uses; but now it seems settled that the king is entitled to them as *ultimus hæres* ; yet in [108] such case it is the practice to transfer the royal claim by letters patent, or other authority from the crown, with a reversion, as it is said, of a tenth, or other small proportion of the property, and then the ordinary of course grants to such appointee the administration (*n*). (1)

It has indeed been asserted that such letters patent are merely in the nature of a recommendation; and that though it be usual for the ordinary to admit such patentee, yet it is rather out of respect to the king than strictly of right (*o*).

Administration may also be granted to the attorney of all executors, or of all the next of kin, provided they reside out of the province : but if the effects are under twenty pounds, such administration may be granted, whether they are so resident or not.

(*h*) Com. Dig. Admon. B. 7. Roll. Ab. 908. Vid. supr. 87.

(*i*) 3 Bac. Abr. 57. Roll. Abr. 908. Fawtry v. Fawtry, Salk. 36. Vid. supr. 98.

(*k*) 11 Vin. Abr. 139. Rose v. Bartlett, Cro. Car. 293.

(*l*) Com. Dig. Admon. B. 7. Roll. Abr. 908. 11 Vin. Abr. 70.

(*m*) 4 Burn. Eccl. L. 241. 11 Vin. Abr. 87. Off. Ex. 174, 175. 2 Bl. Com. 505.

(*n*) Com. Dig. Admon. A. 11 Vin. Abr. 88. Jones v. Goodchild, 3 P. Wms. 33. 1 Wooddes. 398. Dougl. 548.

(*o*) 11 Vin. Abr. 86. Manning v. Napp, 1 Salk. 37.

(1) For the several Acts of Assembly in relation to *Escheats in Pennsylvania*, see *Purdon's Digest*, 251

A grant of administration in a foreign court, as for example at Paris, is not taken notice of in our courts of justice (*p*). (1).

[109] SECT. VI.

Of Administrations to intestate seamen and marines.

WITH regard to the administration of the wages, pay, prize-money, bounty-money, or allowance of money of such petty offi-

(*p*) *Tourton v. Flower*, 3 P. Wms. 371. Vid. *supr.* 72.

(1) Letters of administration granted in a sister state are a sufficient authority to maintain an action in *Pennsylvania*; and such has been the practice without regard to the particular intestate laws of the state where they have been granted. *McCullough v. Young*, 1 Binn. 63. 4 Dall. 292. The provisions of the Act of 1703, in relation to letters of administration granted out of the province, has uniformly been considered not to extend further than to the provinces of this country at the time the act was passed; and hence in *Greene v. Harris*, 1 Dall. 456, it was held that letters of administration granted by the Archbishop of York were not a sufficient authority to maintain an action in this state. The courts of *Virginia* and *New York* do not take notice of letters testamentary, or of administration granted abroad, or out of the state, *Dickinson, adm. v. McCraw*, 4 Rand. Rep. 158. *Morrell v. Dickey*, 1 Johns. Cha. Rep. 153. *Doolittle v. Lewis*, 7 Johns. Cha. Rep. 45. Nor do the courts of *New Hampshire*, (*Sabin v. Gilman*, Adams's Rep. 198,) *Connecticut*, (*Perkins v. Williams*, 2 Root's Rep. 462. *Riley v. Riley*, *Champlin v. Tilley*, 3 Day's Rep. 74. 303. See however *Nicholl v. Mumford*, Kirby's Rep. 274.) *Massachusetts*, (*Goodwin v. Jones*, 3 Mass. Rep. 514. *Stephens v. Gaylord*, *Langdon v. Potter*, 11 Mass. Rep. 369. *Piequet v. Swan*, 3 Mason's Rep. 469.) *Kentucky*, (*Jackson v. Jeffries*, 1 Marsh. Rep. 88.) *Ohio*, (*Kerr v. Moon*, 9 Wheat. Rep. 365.) or the *District of Columbia*, (*Fenwick v. Sears*, 1 Cranch, 259. *Dixon's Ex. v. Ramsey's Ex.* 3 Cranch, 319.) Letters of administration granted in a sister state are not sufficient authority to maintain an action in *North Carolina*, (*Butts' Adm. v. Price*, Cam. & Norw. 68. *Anon.* 1 Hayw. Rep. 355.) though probate and letters testamentary granted in another state will enable executors to sue, if the testator was an inhabitant of the state where such probate was granted. *Stephen v. Smart*, 1 Carol. Law. Rep. 471. But the objection, that the plaintiff was appointed administrator by the authority of another state, must be pleaded in bar or abatement, and cannot be taken after an issue on the merits. *Langdon v. Potter*, *Champlin v. Tilley*. And an administrator appointed in another state may maintain an action on a judgment recovered by him in the courts of that state, because he may sue upon it in his own name. *Tulmudge v. Chapel*, 16 Mass. Rep. 71. So an executor or administrator of a creditor in another state, having possession of a bond and mortgage on lands situate in *New York*, may lawfully, it seems, receive payment of the debt, and give an acquittance, *Doolittle v. Lewis*, 7 Johns. Cha. Rep. 45, as, it also seems, he may for any voluntary payment to him. *Williams v. Storrs*, 6 Johns. Cha. Rep. 353. *Stephens v. Gaylord*. And where an administrator *cum testamento annexo* of a person who was domiciled in *England* at the time of his death, comes into *Massachusetts*, and takes out administration from the probate office, according to the statute, he cannot be cited before the judge of probate to account for assets received by him in *England*. *Selectmen of Boston v. Boylston*, 2 Mass. Rep. 384. *Dawes, Judge, &c. v. Boylston*, 9 Mass. Rep. 337. Nor will he be liable to any action brought against him in that state, so as to subject the real estate of his intestate to be taken in execution. *Borden v. Borden*, 4 Mass. Rep. 67.

Where administration is taken out in one state, the administrator may be called upon, in equity, in any other state, to account for the assets, by a creditor. *Evans v. Tatum*, 9 Serg. & Rawle, 252. *Bryan v. McGee*, 2 Wash. C. C. Rep. 337.

cers, and seamen, non-commissioned officers of marines, and marines, as are above-mentioned, in respect of services in his Majesty's navy by the before-cited stat. 55 *Geo.* 3. c. 60., it is enacted, that the party claiming such administration shall send or give in a note or letter to the inspector of seamen's wills, stating his place of abode, and the parish in which the same is situate, the name of the deceased, the name of the ship or ships to which he belonged, and that he has been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased; upon receipt whereof the inspector shall send or cause to be sent, by course of post, under cover to the minister, officiating minister or curate of the parish wherein the claimant shall reside, a petition or paper containing a list of the degrees of kindred to the tenth degree inclusive, with blanks for the time and place of the intestate's birth, and the ship he belonged to, and that the party had obtained information of his death, with blanks for the place where, and the time when it happened, without leaving a will, to the best of the party's knowledge and belief, and applying to the inspector for a certificate, to enable such party to obtain letters of administration to the deceased's effects, with also a blank of his degree of kindred; and [110] stating that no one, to the best of his knowledge and belief, was of a nearer degree at the time of the intestate's death, who died (with a blank, in which to insert whether) bachelor or widower; to which form shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where the party applying is resident, of their knowledge of him, and of their belief that what he states is true; and also another certificate to be signed by the minister of the parish, and two of the churchwardens or two elders of the same, as the case may be, certifying that such two housekeepers are resident in the parish, and of good repute, and also stating, that if the party applying is the widow of the deceased, she must forward with such certificate an extract from the parish register, or some other authentic proof of her marriage, and containing also the same directions as annexed to the second certificate subjoined to the above-mentioned check (*a*), in regard to proof of the deceased's death, if he died after he had left the naval service, in regard to mentioning the name of a proctor to be employed in obtaining the administration: and that the application, when filled up and attested, shall be sent by the general post under cover, directed to the treasurer or paymaster of his Majesty's navy, London. And the inspector shall at the same time send or cause to be sent to such minister, officiating minister, or curate, a letter, acquainting him with the nature of the claim and the steps to be taken thereon; and also send or cause to be sent, in like manner, to the claimant a letter, advising him, of the forwarding of the petition or paper under cover, to such minister, officiating

minister or curate, and directing him to take such steps as are directed, for the purpose of substantiating his claim to the satisfaction of the inspector; and upon receipt of the said petition or paper and letter, the minister, officiating-minister or curate, shall, on being applied to for his signature to the paper, examine the claimant, and also two inhabitant householders of the parish as may be disposed to sign the first certificate on the paper, touching the right of such claimant to the administration to the effects of the intestate, according to the degree of relationship stated in such petition, and being satisfied of such right, the person claiming such administration shall fill up or cause to be filled up, the several blanks in the first part of the paper, according as the truth may be, and subscribe the same in the presence of the minister, officiating-minister or curate, and the two inhabitant householders shall also subscribe the first certificate on the paper (the blanks therein being first filled up agreeably to the truth) in the like presence; for which purposes the claimant and the householders shall attend at such time and place, as the minister, officiating-minister or curate shall appoint; and the minister, officiating-minister or curate shall sign the second certificate upon the paper (the blanks therein and in the description thereunto subjoined, being first filled up agreeably to the truth); and the claimant shall, before his examination, or his signing the petition or application, pay to the minister, officiating-minister or curate, a fee of two shillings and sixpence for his trouble on the occasion; and the said paper being in all things completed according to the directions therein and hereby given, the same shall be returned by the minister, officiating-minister or curate, by the general post, addressed to the treasurer or paymaster of his Majesty's navy, London; and he on receiving the same shall direct the inspector to examine it, and make such inquiry relative thereto as may appear to him necessary; and, if he shall be satisfied, to make out a certificate, stating the application of the party to his office, containing the party's description, and stating whether he is sole or one of the next of kin of the deceased, the original place of residence of the deceased, and whether seaman or marine, and the name of the ship he belonged to, and that he died intestate, and whether bachelor or widower, together with the time of his death; and that it appearing that no will of the deceased has been lodged in the office, he therefore grants such abstract of the application, and certifies that he believes what is stated to be true; and that such party may obtain letters of administration to the effects of the deceased, which appear not to exceed a sum specified, provided such party is otherwise entitled thereto by law: to which certificate there shall be subjoined a notice, that the previous commission or requisition is to be addressed agreeably to the superscription of the within cover, in which the same is to be enclosed and forwarded by the proctor; and when the commission or requisition shall be returned to the office, it will be forwarded to him, and he is then to sue out letters of administra-

tion, and send them to the inspector, with his charges noted thereon; and then this certificate the inspector shall sign, and address to a proctor in Doctors' Commons, and shall at the same time enclose therein a letter addressed to the ministers and churchwardens, or elders (as the case may be), of the parish within which the party then resides, franked by the treasurer, paymaster, or inspector, in which the previous commission or requisition is to be enclosed, informing him of the application attested by him and the two churchwardens or elders, and requiring him to swear the party accordingly, provided he answers the description contained in such commission or requisition; and when the same is executed, to return it to the treasurer or paymaster of his Majesty's navy, London, and to specify and describe the receiver-general of the land-tax, collector of the customs or of the excise, or the clerk of the cheque, whose abode is nearest to the party applying, when such person will be directed to pay him the wages due to the deceased; and the proctor shall, immediately on receipt of such certificate enclosed in such letter, sue out the previous commission or requisition, and enclose it, with instructions for executing the same, in such letter, and shall transmit the letter by the general post to the minister [113] agreeably to the address put thereon by the treasurer or paymaster of the navy, or the inspector.

If the minister, officiating-minister or curate, shall reject the petition or paper for want of proof to his satisfaction of the claimant being the person entitled to letters of administration of the deceased's effects, such minister, officiating-minister or curate, shall state his reasons for such rejection on the petition or paper, and return the same, addressed to the treasurer or to the paymaster of the navy; and in case no application shall be made to the minister, officiating-minister or curate, by the claimant, or no effectual steps shall be taken by such claimant, so as to complete the petition or paper, and the certificates thereon, within the space of two calendar months from the date of the inspector's letter accompanying such petition or paper, the minister, officiating-minister or curate, shall at the expiration of that time return the petition or paper, addressed to the treasurer or to the paymaster of the navy, with his reason for doing so noted thereon.

The minister shall, immediately upon the receipt of such letter, with the previous commission or requisition or other instrument enclosed therein, take such steps as to him may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument transmitted by the proctor to be executed; and being executed, he shall transmit the same to the treasurer or to the paymaster of his Majesty's navy, London; who shall, immediately upon the receipt thereof, send the previous commission or requisition, or other legal instrument executed by the person applying for the administration, to the proctor employed in Doctors' Commons, who shall forthwith sue out and procure letters of administration in favour of the person so applying for the same,

in the manner and form above-mentioned, to the estate and effects of the intestate.

As soon as any letters of administration, or probates of wills, or letters of administration with will annexed, have been obtained, and passed the seal of the proper court in the manner directed, the proctor who sued them out shall immediately send the same, addressed to the treasurer or to the paymaster of his Majesty's navy, together with a copy of the will, and an account of his charges and expenses in obtaining the same; which shall not exceed the sum or sums thereafter specified; and the treasurer or paymaster of his Majesty's navy, upon receiving such letters of administration, or probates of wills, or letters of administration with will annexed, shall direct the inspector of seamen's wills to issue a check containing the heads thereof; and the inspector shall note thereon the amount of the proctor's charges and expences, provided the same shall be at and after the rates allowed to be charged; and likewise specify and describe upon the said check, the revenue officer or clerk of the cheque residing nearest to the administrator or executor, so to be named in such check, if such communication shall have been made to him; which check so prepared, shall be delivered over by him to the administrator or executor, together with the copy of the will transmitted to him by the proctor, the copy being first stamped by the inspector, if the administrator, or the administrator with will annexed, or the executor, shall be present or demand the same in person; but if he shall not be present, but be and reside at a distance, then the inspector shall deliver such check and such copy of will to the deputy-paymaster.

No proctor shall deliver any letters of administration, probate of will, or letters of administration with will annexed, to any person but the treasurer or paymaster of the navy, or the inspector of seamen's wills, under a penalty of one hundred pounds.

For further penalties upon a proctor acting contrary to the provisions of the act, *vid. supr.* 64.

The statute also prescribes similar regulations in regard to the grant of administration to a creditor of such intestate.

[114] SECT. VII.

Of administrations in case of the death of the administrator, or of the executor intestate.

I AM now to consider the effect of the death of an executor or administrator with regard to the administration.

Where administration is granted to two, and one dies, the survivor shall be sole administrator (*a*); for it is not like a letter of attorney to two, where by the death of one, the authority ceases,

(*a*) 4 Burn. Eccl. L. 241. Hudson v. Hudson, Ca. Temp. Talb. 127.

but it is an office analogous to that of an executor, which survives (*b*).

An administrator is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust; and therefore, on the death of that officer, it results to the ordinary to appoint another. . And if A.'s executor die intestate, the administrator of such executor has clearly no privity or relation to A., since he is commissioned to administer the effects only of the [115] intestate executor, and not of the original testator. In both these cases, therefore, it is necessary for the ordinary to commit another administration (*c*).

But, with regard to the species of administration to be thus granted, a distinction arises between the case where the executor or next of kin had before his death taken out probate or letters of administration, and where he had omitted to do so.

If an executor die before probate, his executor cannot prove or take on himself the execution of the will of the original testator, because he is not thereby named executor to such testator. He only can prove the will who by the will is constituted executor. The omission of the first executor to prove the same on his death determines, although it does not avoid the executorship, or vacate the acts which he has performed in such character (*d*).

When this case occurs, an administration must be granted, and the grantee shall be the representative of the party who originally died; but it shall be an immediate administration, that is, without making mention of the executor, whether he did in point of fact [116] administer, or not; because administering is an act in *pais*, of which the spiritual court cannot take notice. The ordinary must commit administration, as it appears to him judicially; and it can thus appear only by the probate (*e*).

In like manner, if A. die intestate, and B. be entitled to administer, and die before he take out administration, an immediate administration shall be committed: in such case it shall be granted to the representatives of B. if the only party in distribution, in preference to the representatives of A., because by the statute of distributions B. had a vested interest, and in such grant the ecclesiastical court regards the property; and therefore if a son die intestate without wife or child, leaving a father, and the father shall himself die before he takes out administration, it shall be committed to his representatives (*f*); and so it has been held, in case the wife die intestate, and the husband die before he takes out admini-

(*b*) 3 Bac. Abr. 56. *Adams v. Buckland*, 2 Vern. 514. 11 Vin. Abr. 69. Com. Dig. Admon. B. 7. pl. 4. *Shep. Touch.* 464. *Isted v. Stanley*, *Dyer*, 372. *Comber's Case*, 1 P. Wms. 767.

(*c*) Com. Dig. Admon. B. 6. 4. (*e*) *Wankford v. Wankford*, 1 Salk. 308. 3 Bac. Abr. 19. *Burn. Eccles. L.* 241. 1 Roll. Abr. 907. 2 Bl. Com. 506.

(*d*) 11 Vin. Abr. 67. 90. 111. (*f*) 11 Vin. Abr. 88. pl. 25. *Squibb v. Wyn*, 1 P. Wms. 381. Vid. also *Wankford v. Wankford*, 1 Salk. 308, Com. Dig. Admon. B. 6. Vid. *Earl of Winchelsea v. Norcliffe*, 1 Vern. 403.

nistration, it shall be granted to the representatives of the husband; but it is now settled that the court is in the latter instance bound by stat. 31 *E.* 3. to grant administration to the next of kin of the wife, and then he shall be a trustee in equity for the husband's representatives (*g*).

If the deceased executor had taken out probate, or the deceased's next of kin administration, then another species of administration, which hath not hitherto been mentioned, becomes necessary, namely, an administration *de bonis non*, that is, of the goods of the deceased left unadministered by the former executor or administrator, by the grant of which, such administrator *de bonis non* becomes the only personal representative of the party originally deceased (*h*). (1)

Administration of either species is, generally speaking, granted to the next of kin of such party. But in case there be a residuary legatee, it shall be granted to him in preference to such next of kin on the principle above stated, because the next of kin has then no interest in the property (*i*). Thus where A. made C. executor and residuary legatee, and B. made C. executor without giving him the surplus, and C. afterwards died intestate, it was held, that the administrator of C. should be administrator *de bonis non* of A., but that the next of kin of B. should be administrator *de bonis non* of B. (*k*). If the residue be bequeathed to several persons, such administration may be granted to all or either of them, as in the case of an original administrator, although there be no present residue (*l*). But for such purpose there must be a complete [118] disposition of the property (*m*). If the executor be himself residuary legatee, although he refused, or, *before* he proved the will, died *intestate*, an immediate administration with the will annexed shall be granted to his administrator (*n*). If an executor be residuary legatee, although he refused, or died *before* probate, *leaving a will*, his executor will be entitled to such administration (*o*). If an executor and residuary legatee, *after* pro-

(*g*) Elliot v. Collier, 3 Atk. 526. S. C. 1 Ves. 16. and 1 Wils. 169. 4 Burn. Eccl. L. 235. 11 Vin. Abr. 88, pl. 27. Squib v. Wyn, 1 P. Wms. 382. note 1. Vid. infr. 217.

(*h*) 11 Vin. Abr. 111. Attorney-General v. Hooker, 2 P. Wms. 340. Com. Dig. Admon. B. 1. Plowd. 279. 3 Bac. Abr. 19.

(*i*) Com. Dig. Admon. B. 6. Thomas v. Butler, 1 Vent. 219. S. C. 2 Lev.

56. 3 Bac. Abr. 19.

(*k*) 11 Vin. Abr. 87. Farrington v. Knightly, Prec. Chan. 567.

(*l*) Com. Dig. Admon. B. 6. Vid. Thomas v. Butler, 2 Lev. 56.

(*m*) 11 Vin. Abr. 89. Jo. 225.

(*n*) 11 Vin. Abr. 88. 92. 2 Roll. Rep. 158.

(*o*) Com. Dig. Admon. B. 6. Isted v. Stanley, Dy. 372.

(1) In *Brattle v. Gustin*, 1 Root, 425, letters of administration were revoked at the instance of a creditor, who alleged there was estate sufficient to pay his debt (a judgment), and administration *de bonis non* granted. And the distribution of the estate is no objection to its being granted upon the application of a creditor. *Brattle v. Converse*, 1 Root, 174.

bate, die intestate, administration *de bonis non*, with the will annexed of the testator, shall be granted to the administrator of such executor. If a feme covert executrix die intestate, then as to the effects which she had in that capacity, administration shall be granted to the residuary legatee if any, or to the next of kin of the testator. If she were herself residuary legatee, it shall be granted to her husband (*p*).

Where there are two executors, of whom only one proves and dies, and then the other renounces, the executors of the acting executor have no concern with the administration of the goods unadministered, but the same shall be granted to the next of kin, or residuary legatee of the first testator (*q*).

[119] So, if there be two executors, one of whom appoints an executor, and dies, and the survivor dies intestate, the executor of the executor shall not intermeddle with the first testator's effects; for the power of his testator was determined by his death, and the executorship vested solely in the other executor as survivor.

So where an administrator is appointed during the minority of the executor of an executor, he has no authority to intermeddle with the effects of the original testator. The ordinary, in either case, shall commit administration *de bonis non* to the next of kin or residuary legatee of the original testator (*r*).

SECT. VIII.

How administration shall be granted—when void—when voidable—of repealing the same—how a repeal affects mesne acts.

ADMINISTRATION is generally granted by writing under seal; it may also be committed by entry in the registry, without letters *sub sigillo*; but it cannot be granted by parol (*a*). (1)

[120] In letters of administration the style of jurisdiction, as well as the name of the ordinary, shall be inserted (*b*).

A party may refuse the office, nor can the ordinary compel him to accept it (*c*).

Where administration is improperly granted, a distinction oc-

(*p*) 11 Vin. Abr. 89. 91. 111. Rachfield v. Careless, 2 P. Wms. 161. 4 Burn. Eccl. L. 236. 3 Salk. 21. 11 Vin. Abr. 90, 91. 95. 108. Vanthieuson v. Vanthieuson, Fitzgibb. 203. Johnson's case, Poph. 106.

(*q*) Com. Dig. Admon. B. 1. House v. Lord Petre, Salk. 311.

(*r*) 11 Vin. Abr. 67. in note 89. Off. Ex. 101. Limmer v. Every, Cro. Eliz. 211. 3 Bac. Abr. 13.

(*a*) 11 Vin Abr. 70. Anon. 1 Show. 408, 409. Godolph. 231. Com. Dig. Admon. B. 7.

(*b*) 4 Burn. Eccl. L. 273.

(*c*) Id. 233.

(1) As to the manner of granting administration in *Pennsylvania*, see *ante*, page 83, note (2).

curs between administrations which are void, and such as are only voidable.

If there be an executor, and administration be granted before probate and refusal, it shall be void on the will's being afterwards proved, although the will were suppressed, or its existence were unknown (*d*), or it were dubious who was executor (*e*), or he were concealed or abroad (*f*) at the time of granting the administration. Or, if there be two executors, one of whom proves the will, and the other refuses, and he who proved the will dies, and administration is granted before the refusal of the survivor, subsequently to the death of his co-executor; or if granted before the refusal of the executor, although he afterwards refuse (*g*), such administration shall be void. (1) It shall also be void if granted on the ground of the executor's becoming a bankrupt, as it was before the stat. [121] 38 Geo. 3. c. 87., if committed *durante minoritate*, where the infant executor had attained the age of seventeen (*h*). It shall also be void if granted by an incompetent authority, as by a bishop, where the intestate had *bona notabilia* (*i*), or by an archbishop, of effects in another province (*k*).

In all these instances the administration is a mere nullity. The executor's interest the ordinary is incapable of divesting. But there is another description of cases, where administration is not void, but voidable only by the act of the spiritual court, as if administration be granted to a party not next of kin (*l*), or to one of kin together with one not of kin, as to a sister and her husband (*m*); or to the wife's next of kin instead of the husband (*n*); or if it be granted on the refusal of an executor who had before administered (*o*); or if it be granted, *non vocatis jure vocandis*, without citing the necessary parties (*p*); or to a stranger (*q*); or by fraud

(*d*) Com. Dig. Admon. B. 1. Plowd. 279. 282.

(*e*) Com. Dig. Admon. B. 1. Robin's Case, Moore, 636.

(*f*) 11 Vin. Abr. 68. Abram v. Cunningham, 2 Lev. 182.

(*g*) Com. Dig. Admon. B. 2. B. 10. Abram v. Cunningham, 2 Lev. 182. Vid. Anon. 1 Show. 411.

(*h*) 11 Vin. Abr. 99. 5 Co. 29 b.

(*i*) 3 Bac. Abr. 36. Com. Dig. Admon. B. 3. Blackborough v. Davis, 1 Salk. 39. 1 P. Wms. 44. 767. S. C.

(*k*) Allison v. Dickenson, Hard. 216.

(*l*) Com. Dig. Admon. B. 6. Blackborough v. Davis, Salk. 38. 1 P. Wms. 43. S. C.

(*m*) Com. Dig. Admon. B. 8. Al. 36.

(*n*) 11 Vin. Abr. 85. Anon. 1 Sid. 409.

(*o*) Com. Dig. Admon. B. 8. Off. Ex. 40, 41.

(*p*) 11 Vin. Abr. 115. Com. Dig. Admon. B. 8. Ravenscroft v. Ravenscroft, 1 Lev. 305.

(*q*) 11 Vin. Abr. 95. Wilson v. Pate-man, Moore 396.

(1) In *Massachusetts*, by the 10th sect. of the Act of 9th March, 1784, administration originally granted upon the estate of any deceased person, after the expiration of twenty years from the death of such person is *ipso facto* void, and the defendant in an action brought by any one to whom administration has been granted after such period of twenty years, may plead, that the plaintiff is not, nor ever was administrator. *Wales v. Willard*, 2 Mass. Rep. 121.

and misrepresentation, though otherwise duly granted (*r*), (1) as where the grantee by false suggestions prevented a party in equal degree from applying; or in case administration be granted in con-[122] sequence of the incapacity of the next of kin, and the incapacity be removed (*s*); or if the grantee shall become *non compos mentis*, or otherwise incapable (*t*); or if it be granted to a creditor before renunciation of the next of kin (*u*); it is not void, but voidable, and may be repealed. (2)

If there be a residuary legatee, and administration be granted to the next of kin, though not void, it may also be repealed, whether there be any present residue or not (*w*).

Although a feme covert die entitled to several debts due to her before marriage; which by law do not belong to the husband, and her next of kin appear, and take out administration, it shall be repealed, and administration granted to the husband (*x*).

If there be two grants of administration, one by the metropolitan, and the other by the bishop, when there are not *bona notabilia*, the prerogative administration may be repealed (*y*).

At common law the ordinary might repeal an administration at his pleasure, but now, since the stat. 21 H. 8., if administration be [123] regularly granted to the next of kin, according to the provisions of the same, the ordinary has no such discretion. If he assign a cause for a repeal, the temporal courts are to judge of its sufficiency (*z*). Thus it was held, that where the ordinary had elected to grant administration to the father, he had no power of repealing the administration at the suit of a party alleging herself to be the widow (*a*).

So where administration was granted to a sister, a married woman, pending a caveat entered by the brother, on appeal it was adjudged that the administration should not be revoked at his suit (*b*).

And where administration was granted to the younger brother, and the elder sued to repeal it, the decision was the same; but in that case it was intimated it would have been different if the ad-

(*r*) 11 Vin. Abr. 114. 117. Harrison v. Mitchell, Fitzgibb. 303.

(*s*) 11 Vin. Abr. 115. Offley v. Best, 1 Sid. 373.

(*t*) 11 Vin. Abr. 115, 116.

(*u*) Com. Dig. Admon. B. 6. Blackborough v. Davis, 1 Salk. 38. 4 Burn. Eccl. L. 249. Harrison v. Weldon, Stra. 911.

(*w*) Com. Dig. Admon. B. 8. Thomson v. Butler, 2 Lev. 56. 1 Ventr. 219. S. C.

(*x*) 11 Vin. Abr. 92. in note 116.

Dubois v. Trant, 12 Mod. 438.

(*y*) 11 Vin. Abr. 114. Allens v. Andrews, Cro. Eliz. 283. Com. Dig. Admon. B. 8.

(*z*) 11 Vin. Abr. 114. 4 Burn. Eccl. L. 248, 249. Com. Dig. Admon. B. 8. Blackborough v. Davis, 1 P. Wms. 42. sed vid. Skinner, 156.

(*a*) Sand's case, Raym. 93. S. C. 3 Salk. 22. 11 Vin. Abr. 115. S. C. 1 Kebl. 667. 683. S. C. 1 Sid. 179.

(*b*) 11 Vin. Abr. 115. Offley v. Best, 1 Lev. 186.

(1) *Shaufler v. Stoeve*, *Adm.* 4 Scrg. & Rawle, 202. Observe the facts of the case.

(2) See *Frazier v. Griffith*, 8 Cranch, 9. *Royal v. Eppes*, 2 Munf. Rep. 479.

ministration had been granted pending a caveat (*c*). Nor, if administration be granted to a creditor, and afterwards a creditor to a larger amount appear, shall it be revoked for him (*d*). So where administration during the infancy of the intestate's sister was committed to the great-grandmother, and though the grandfather, the plaintiff in prohibition, suggested that the administration was granted by surprise, and that, as he was nearer of kin, it ought to be granted to him; the court thought, in this instance, propinquity to be no ground of preference, and, since the ordinary had no power at common law to grant such administration in the case of an infant next of kin, but only in that of an infant executor, having once executed his authority, the grant ought not to be repealed (*e*). So where A., an infant, was made executor and residuary legatee, and if he died under age, then B., another infant, was appointed residuary legatee, and on the like contingency, the residue was bequeathed to C.; administration during the minority of A. was granted to M. his mother; A. died intestate under age, B. was still an infant; and on the question whether the administration might be repealed and granted to C., the court seemed to be of opinion, that the ordinary had executed his authority, and that M. should not be divested of the administration during the infancy of B. (*f*).

So also administration *de bonis non*, with the will annexed, granted to one, where two had equal right, is good, and shall not be revoked (*g*).

[125] But, in general, if administration be granted to a wrong party, in such case the ordinary may repeal it, and grant it to another, for he has not executed his authority, and it is a power incident to every court to rectify its errors (*h*). (1)

Therefore, where a feme covert has died intestate, and her next of kin had obtained administration, it was adjudged that it should be repealed at the suit of the husband, because the ordinary had no power or election to grant it to any other than to him (*i*).

A person in possession of an administration, is not bound to propound his interest till the party calling in question the grant has first propounded and proved his (*k*).

(*c*) 11 Vin. Abr. 116. *Ayliffe v. Ayliffe*, 2 Kebl. 812. *Harrison v. Mitchell*, Fitzgib. 303.

(*d*) 11 Vin. Abr. 116. *Dubois v. Trant*, 12 Mod. 438.

(*e*) 11 Vin. Abr. 100, 116. *Ld. Grandison v. Countess of Dover*, 3 Mod. 23, 25. *Ld. Grandison v. Countess of Devon*, Skin. 155. *Vid. Sadler v. Daniel*, 10 Mod. 21.

(*f*) 11 Vin. Abr. 116. *Dubois v.*

Trant, 12 Mod. 436, 438.

(*g*) 11 Vin. Abr. 116. *Taylor v. Shore*, 2 Jo. 161.

(*h*) 11 Vin. Abr. 114. 4 Burn. Eccl. L. 248, 249. *Com. Dig. Admon. B. 8. Blackburn v. Davis*, 1 P. Wms. 42. *sed vid. Skinner*, 156.

(*i*) 11 Vin. Abr. 116. 4 Burn. Eccl. L. 248. *Sand's Case*, 3 Salk. 22.

(*k*) *Dabbs v. Chisman*, 1 Phill. Rep. 155. *Hibben v. Calemberg*, ib. 166.

(1) The Register's court has a right to revoke letters of administration where they have issued improperly, and direct new letters to issue to the proper person. *Stocker v. Ludwig*, 4 Serg. & Rawle, 201.

If the administration be repealed for want of form in the grant, in such case the ordinary must regrant it to the same party, although there be others in equal degree (*l*).

If administration be repealed *quia improvide*, that is, where, on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event; or where the court on committing it took security inadequate to the value of the property, it shall be granted to the same person (*m*).

Nor can the ordinary revoke the grant on account of abuse, al-[126] though the letters were issued after a caveat entered, for he ought to take sufficient caution in the first instance to prevent mal-administration (*n*). Nor can he revoke it on the administrator's omission to bring in an inventory and account (*o*).

If the grant regularly issue, and subsequent letters of administration be obtained by collusion, such subsequent letters are void, and shall not repeal the former administration (*p*).

Some authorities maintain, that if the ordinary commit administration to the wrong party, and then commit it to the right, the second grant is a repeal of the first without any sentence of revocation (*q*); but in other cases it is held, that the first is not avoided except by judicial sentence (*r*). And the practice is, to call in and revoke the first administration before the second is granted. But after an administration by an archbishop, if the bishop to whom it belongs grant administration and then the first administration be repealed, the administration granted by the bishop before the repeal shall stand good (*s*).

So in all cases where the first administration is repealed, the se-[127] cond shall be valid, though committed after the grant of the first, and before the repeal of it (*t*).

If the ecclesiastical courts, in the granting or repealing of administrations, shall transgress the bounds which the law prescribes to them, a prohibition from the temporal courts shall be awarded, as in the case above-mentioned, where the ordinary has granted a regular administration, and is proceeding to repeal it on insufficient grounds, such as mal-administration (*u*), or that the letters issued after a caveat entered (*v*): but no prohibition to the ecclesiastical courts shall issue on suggestion, that they are about to repeal an administration granted by surprise, or that they refused to commit the administration to the intestate's next of kin, but were proceed-

(*l*) 11 Vin. Abr. 115. Offley v. Best, 1 Sid. 293.

(*m*) Com. Dig. Admon. B. 3. Offley v. Best, 1 Sid. 293.

(*n*) 11 Vin. Abr. 115. Com. Dig. Admon. B. 8. Thomas v. Butler, 1 Ventr. 219.

(*o*) 11 Vin. Abr. 116. Sty. 102.

(*p*) 11 Vin. Abr. 114. 3 Co. 78 b.

(*q*) 11 Vin. Abr. 114. 4 Burn Eccl. L. 249.

(*r*) 11 Vin. Abr. 115. in note. Pratt v. Stocke, Cro. Eliz. 315.

(*s*) Com. Dig. Admon. B. 3, 8. Co. 135 b.

(*t*) Com. Dig. Admon. B. 3. Vid. 2 Brownl. 119.

(*u*) Thomas v. Butler, 1 Ventr. 219. Al. 56.

(*v*) Offley v. Best, 1 Lev. 186. Dub. S. C. 1 Sid. 371. 1 Lev. 187. & vid. supr.

ing to grant it to another, for the point, who is in fact next of kin, is of spiritual cognisance, and must be contested before the spiritual jurisdiction (*w*).

How far the repeal of an administration affects the intermediate acts of the former administrator, remains now to be considered.

And here we must again recur to the distinction between such [128] administrations as are void, and such as are only voidable. If the grant be of the former description, the mesne acts of such administration shall be of no validity; as, if administration be committed on the concealment of a will, and afterwards a will appear; inasmuch as the grant was void from its commencement, all acts performed by the administration in that character shall be equally void (*x*). Or if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the executor afterwards appear and renounce (*y*). Or if the executor omit proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt, which is not extinguished by the administration (*z*). So where an administratrix sued a debtor of the intestate, and, pending the suit, another by fraud procured a second administration to himself jointly with her, and after judgment released to the debtor, on which he brought an *audita querela*, and in the mean time the second administration was revoked, the release was held to be of no avail (*a*).

Thus in all other cases the acts of the administrator are of no effect, where the administration is unlawful *ab initio*.

[129] If the grant were only voidable, then another distinction arises between the case of suit by citation, which is to countermand or revoke former letters of administration; and on appeal which is always to reverse a former sentence (*b*).

In case of an appeal, such intermediate acts of the administrator shall be ineffectual; because, as we have before seen, the appeal suspends the former sentence, and on its reversal it is as if it had never existed (*c*).

But if administration be only voidable, and the suit be by citation, all lawful acts by the first administrator shall be valid, as a *bonâ fide* sale, or a gift by him of the goods of the intestate; and such gift shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the citation; although by the stat. 13 *Eliz. c. 5.* it be void as to a credi-

(*w*) Blackborough v. Davis, 1 P. Wms. 43. 2 Bl. Com. 112. 11 Vin. Abr. 92, 115. Com. Dig. Admon. B. 7, 8.

(*x*) Com. Dig. Admon. B. 10. Abram v. Cunningham, 2 Lev. 182. 3 Bac. Abr. 50.

(*y*) 11 Vin. Abr. 95. Abram v. Cunningham, 2 Mod. 146.

(*z*) Com. Dig. Admon. B. 10. Baxter and Bale's Case, 1 Leon. 90. 11 Vin. Abr. 94.

(*a*) Com. Dig. Admon. B. 10. Anon. Dyer, 339. 6 Co. 19.

(*b*) 6 Co. 18 b.

(*c*) Allen v. Dundas, 3 Term Rep. 129. 11 Vin. Abr. 117.

tor (*d*). So if administration be committed to a creditor, and afterwards repealed on citation at the suit of the next of kin, such creditor shall retain against the rightful administrator; and his disposal of the goods pending the cause, and before sentence of repeal, shall be effectual (*e*). (1) If an administrator assign a term, and, on a subsequent citation to repeal the administration, it is confirmed, and on appeal the sentence is reversed, the assignment shall [130] be good, for the repeal is merely of a sentence on citation, and therefore of the nature of a suit on such process; consequently the effect is the same as if the first administration had been avoided in such suit, and not as if an appeal had been brought in the first instance (*f*).

But where an administrator sold a term in trust for himself, although the administration were revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside (*g*). (2)

Whether the administration be void or voidable, a *bona fide* payment to the administrator of a debt due to the estate shall be a legal discharge to the debtor, by analogy to the case before stated in regard to such payment under probate of a forged will (*h*). (3) In a case as early as the time of Charles the Second, where the administrator of the lessee paid rent to the administrator of the lessor, and the latter administration was repealed and granted to A., and he brought an action as well for the rent paid to the former administrator of lessor, as for rent which accrued due subsequently to the repeal, and obtained a verdict and judgment for the same, the defendant was relieved in equity in regard to the rent he [131] had paid, inasmuch as he had paid it to the visible administrator (*i*).

This, however, is to be understood only where the grant is revoked on citation; if it be reversed on appeal, the administrator's

- (*d*) Com. Dig. Admon. B. 9. 1 Abr. 118.
 Salk. 38. 6 Co. 18. b. 11 Vin. Abr. 95. (*g*) 11 Vin. Abr. 95. Jones v. Wal-
 (*e*) Blackborough v. Davis, 1 Salk. ler, 2 Ch. Ca. 129.
 38. 11 Vin. Abr. 117. Thomas v. But- (*h*) Allen v. Dundas, 3 Term Rep.
 ler, 1 Ventr. 219. 125. *supr*.
 (*f*) Syms v. Syms, Raym. 224. Sc- (*i*) 11 Vin. Abr. 117. Finch. Rep. 40.
 mine v. Scmine, 2 Lev. 90. 11 Vin.

(1) *Benson, adm. v. Rice et al.* 2 Nott & M'Cord, 577.

(2) Though the law is too well established now to be drawn in question, that an administrator cannot, at either public or private sale, purchase in the goods of an intestate for his own use, yet if the goods are *bona fide* purchased by a third person for his own use and benefit, without collusion between him and the administrator, neither the principles of law nor equity preclude the administrator from afterwards acquiring a right in the goods by a subsequent contract with such purchaser. *Scott v. Burch*, 6 Harr. & Johns. 67; see the close of the judgment.

(3) *Peeble's Appeal*, 15 Scrg. & Rawle, 39. And where an administrator *pendente lite*, who has no power to make distribution of the estate, has made distribution according to law, the court will not compel him to refund to the general administrator, in order that he may pay it over again to the same persons. *Case of Bradford's Administrators*, P. A. Browne's Rep. 87.

authority was suspended by the appeal, and of course such payments shall be void. (1)

But whether the administration be void or voidable, or be revoked on citation or appeal, if an action be brought by the administrator, and, while it is pending, administration is committed to another, the writ shall be abated (*k*).

Or if the administrator, before the repeal, obtain a judgment for a debt due to the intestate he is not entitled to take out execution, but the defendant may avoid the judgment by an *audita querela* (*l*). So, if the defendant be actually in execution, the judgment shall be vacated in the same manner, and the execution set aside (*m*): for in such cases the plaintiff had no authority but by virtue of a commission from the ordinary, and when that is determined, his authority is determined with it. But on affidavit to stay execution on a judgment recovered by an administrator, on the ground that [132] the letters of administration were repealed before the judgment entered, it was held that the matter did not come legally in question before the court, and that the party ought to bring an *audita querela* (*n*).

If administration be granted, and afterwards an executor appear, if the administrator have paid debts, legacies, or funeral expenses, he shall be allowed to deduct such payments in the damages recovered against him in an action by the executor (*o*). (2)

- (*k*) 11 Vin. Abr. 118. Bro. Admon. 343.
 pl. 3. (*m*) 11 Vin. Abr. 117. Ket v. Life,
 (1) 11 Vin. Abr. 102. 117. Com. Yelv. 125. 3 Bac. Abr. 51.
 Dig. Admon. B. 10. Turner v. Davies, (*n*) 11 Vin. Abr. 117. Styl. 417.
 2 Sand. 149. S. C. 1 Mod. 62. Lut. (*o*) 3 Bac. Abr. 50. Plow. 282.

(1) In *Pennsylvania*, by the 18th sect. of the Act of 13th April, 1791, (Purd. Dig. 703, 3 Dall. 93, 3 Sin. Laws, 30,) "No appeal from the decree of the Register's court concerning the validity of a will, or the right to administer, shall stay the proceedings, or prejudice the acts of any executor or administrator pending the same, provided the executor shall give sufficient security for the faithful execution of the will and testament, to the Register: but in case of refusal, the said Register is directed to grant letters of administration pending the dispute, which shall suspend the power of such executor during that time."

Where a defendant has received letters testamentary on a will duly proved, he is authorized to perform every act proper for an executor to do, notwithstanding the pendency of the question relative to the validity of the will. *Bradford v. Boudinot*, 3 Wash. C. C. Rep. 122.

A decree of the Register's court revoking letters of administration, and directing them to issue to another person, which decree has been appealed from by the administrator, does not, while such appeal is pending and undetermined in the Supreme Court, suspend his power of proceeding to recover the debts due to his intestate. *Shaufler v. Stoecker*, 4 Serg. & Rawle, 202.

(2) An executor obtained letters on a will duly proved, which was afterwards caveated, and finally adjudged not to be the will of the deceased. *Held*, that it was his duty to support the first probate, believing it genuine, and that he was entitled to retain out of the estate the amount of the funeral expenses, the expenses incurred in litigating the question of the validity of the will, and also the usual commissions for managing the estate while in his hands. *Bradford v. Boudinot*, 3 Wash. C. C. Rep. 122.

If administration have been granted to a creditor, he has a right to maintain it against the executor of a will afterwards produced, or the next of kin; it is not to be revoked on mere suggestion, and he is at liberty to show cause why it should not be revoked (*p*).

But if administration be granted to a creditor, and he settles his own debt and goes away, it will be revoked, and a new administration granted (*q*).

(*p*) *Elme v. Da Costa*, 1 Phill. Rep. 173. (*q*) *In re Jenkins*, 2 Phill. Rep. 33.

BOOK II.

OF THE RIGHTS AND INTERESTS OF EXECUTORS AND ADMINISTRATORS.

CHAP I.

OF THE GENERAL NATURE OF AN EXECUTOR'S OR ADMINISTRATOR'S INTEREST—DISTRIBUTION OF THE SUBJECT WITH REFERENCE TO THE DIFFERENT SPECIES OF THE DECEASED'S PROPERTY.

AN executor or administrator represents the person of the testator or intestate in respect to his personal estate, the whole of which, generally speaking, vests in the executor immediately on the testator's death: in the administrator, on the grant of letters of administration (*a*); and such grant hath relation to the time of the intestate's decease (*b*).

The interest which such representative takes in the deceased's property is very different from that which belongs to him in regard to his own. Instead of being an absolute interest, it is only temporary and qualified. He is not entitled in his own right, but [134] *in autre droit*, in right of the deceased. He is intrusted merely with the custody and distribution of the effects (*c*).

Hence, if a tenant for years die, having appointed him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge, for he has the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies (*d*). So if an executor be attainted of felony or treason, he incurs a forfeiture of all his own goods and chattels, but those of which he is possessed as executor shall not be forfeited (*e*).

If he grant all his property, such as belongs to him in the character of executor shall not pass, unless he be so named in the grant (*f*), or unless he have no other property (*g*).

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|---|---|
| (<i>a</i>) Com. Dig. Admon. B. 10, 11. | (<i>e</i>) Marlow v. Smith, 2 P. Wms. Co. Litt. 209. 3 Bac. Abr. 57. Off. 200. |
| Ex. Suppl. 47. | (<i>f</i>) Off. Ex. 86. Vid. 2 Roll. Abr. 58. pl. 8. Ld. St. John's Case, 1 Leon. 263. Shep. Touch. 94. Marlow v. Smith, 2 P. Wms. 200. |
| (<i>b</i>) Com. Dig. Admon. B. 1. 2 | (<i>g</i>) Hutchinson v. Savage, Ld. Roll. Abr. 554. |
| (<i>c</i>) Off. Ex. 85. 88. Plowd. 182. | Raym. 1307. |
| 525. 11 Vin. Abr. 54. 9 Co. 88 b. | |
| Rutland v. Rutland, 2 P. Wms. 212. | |
| (<i>d</i>) 2 Bl. Com. 177. | |

If he become bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money, which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself (*h*). Nor can the testator's goods be taken in execution for the executor's debt, either on a recogni- [135] zance, statute, judgment, or for his debts of whatever nature (*i*), unless there be sufficient evidence, either direct or presumptive, of the executor's having converted the goods to his own use (*k*), or unless he consent to such seizure, and then it differs not from any other alienation; an execution acquiesced in being equivalent to a conveyance (*l*).

Therefore, where an executor brought an action in the court of exchequer, suggesting that the defendant detained from him one hundred pounds, which he owed to him as executor of J. S., whereby he was the less able to pay a debt due from himself to the crown; the writ was abated, because the court could not intend that the king's debt could be satisfied by a judgment recovered by the plaintiff in that capacity (*m*).

And where a creditor laid by for six or seven years, permitting the executor to remain in possession of the testator's property, the court refused to restrain by injunction a creditor of the executor from taking in execution the goods of the testator for the executor's own debt (*n*).

Nor can an executor bequeath the effects which he holds in that right (*o*). And if he die without a will, his administrator shall not, as we may remember, intermeddle with the testator's estate. Nor if an executor die in debt, shall the effects of the testator be [136] liable in the hands of the executor's representative, to the payment of the executor's debts (*p*).

So, if an executrix marry, all the personal chattels of which she is possessed in her own right, are of course absolutely vested in the husband. But in respect of the goods of the testator, they are not transferred by the marriage (*q*).

Nor if the husband of an executrix sue jointly with her for a debt due to her in that character, and she die after judgment, and before execution, can the husband have execution on the judgment: for although he were privy to the judgment, yet he shall not recover the debt, because it belongs to the testator's representative (*r*). Nor shall a term in the hands of the husband in right of his wife as administratrix be extendible for his debt (*s*).

(*h*) *Copeman v. Gallant*, 1 P. Wms. 519. *Howard v. Jemmett*, 3 Burr. 1369. *Bourne v. Dodson*, 1 Atk. 158.

(*i*) 11 Vin. Abr. 272. *Com. Dig. Admon. B. 10*. Off. Ex. 86. *R. Farr v. Newman*, 4 Term Rep. 621. *Buller J. contra*. See also *Whale v. Booth*, *ibid.* 625. in note, and 632.

(*k*) *Vid.* *Farr v. Newman*, and also *Quick v. Staines*, 1 Bos. & Pull. 293.

(*l*) *Per Lord Mansfield in Whale v. Booth*.

(*m*) Off. Ex. 87.

(*n*) *Ray v. Ray*, *Coop. Rep.* 264.

(*o*) 11 Vin. Abr. 421. *Plowd.* 525. Off. Ex. 86.

(*p*) Off. Ex. 86.

(*q*) Off. Ex. 87.

(*r*) 1 Roll. Abr. 889. tit. *Execution*.

(*s*) *Ridler v. Punter*, *Cro. Eliz.* 291.

But where A. appointed his widow executrix, who continued in possession of his goods during three months after his death, and at the end of that time married B., and, for half a year after the marriage, the goods were treated by them both as the goods of B., it was held, that they might be taken in execution at the suit of B.'s creditor (*l*).

Such is the nature of the interest to which an executor or administrator is entitled in that right, and so distinguishable is it from that which pertains to him in his own.

The personal property, in which they are thus respectively interested, that is of a saleable nature, and may be converted into ready money, is called assets in the hands of the executor, or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and legatee, or party in distribution, so far as such goods and chattels extend (*u*).

The personal effects comprehend so wide a circle, that in order to view them with any distinctness, it is necessary they should be arranged in a variety of classes.

I shall therefore first consider them as distinguished into chattels real, and chattels personal, in the deceased's possession at the time of his death.

I shall then treat of such as were not in his possession. And,

Among such as were not in his possession, of things in action, as well those where the cause of action accrued in his lifetime, as those where it accrued after his death.

I shall then proceed to the examination of such chattels as vest [138] in the executor, or administrator, by condition, by remainder, or increase, by assignment, by limitation, and by election.

I shall next enquire what chattels go to the heir, successor, devisee, or remainder-man.

Then shew to what the widow shall be entitled.

Then describe the nature of the interest of a donee *mortis causa*.

And lastly, point out how effects, which an executor or administrator takes in that character, may become his own.

(*l*) Quick v. Staines, 2 Bos. & Pull.
293.

(*u*) 1 Bl. Com. 510. Off. Ex. Suppl.
53. Shep. Touchst. 496.

CHAP. II.

OF THE INTEREST OF AN EXECUTOR OR ADMINISTRATOR IN THE CHATTELS REAL AND PERSONAL.

SECT. I.

Of his interest in the chattels real.

FIRST, the personal representative is entitled to the chattels real, that is, such as concern or savour of the realty, as terms for years of houses, or land, mortgages, the next presentation to a church, estates by statute merchant, statute staple, or elegit, interests for years in adowsons, commons, fairs, corodies, estovers, profits of leets, and the like. This species of chattels is styled by the civil law immoveable goods, and, inasmuch as they are interests issuing out of, or annexed to real estates, in the immobility of which they participate, by our law they are described as real. And also, as the utmost period of their existence is fixed and limited, either for such a space of time certain, or till such a particular sum be raised out of such a particular income, and consequently are distinguishable from the lowest estate of freehold, the duration of which is necessarily indeterminate, they are denominated chattels (*a*).

[140] Lands devised to an executor for a term of years for payment of debts are assets in his hands (*b*). (1)

Leases are likewise assets to pay debts, although the executor assent to the devise of them (*c*). And in case a term be devised to the executor, and he enter, and die before probate, the term shall be deemed to be legally vested in him by his entry, and the devise executed without the probate (*d*). So a lease for years determinable on lives is a chattel interest, and shall vest in the personal representative of such lessee (*e*).

If an estate be granted to A. *pur autre vie*, but not limited to his heirs, and A. die in the lifetime of the *cestui que vie*, or of him by whose life it is holden, as there is no special occupant, the heir not being named in the grant, it shall by the stat. 29 *Car. 2. c. 3.* go to the executor, and be assets in his hands for payment of debts,

(*a*) 2 Bl. Com. 386. 3 Bac. Abr. 57, 58, 69, 61. Off. Ex. 53, 54, 75. 11 Vin. Abr. 173. 227. Pynchyn v. Harris, Cro. Jac. 571. Off. Ex. Suppl. 59.

(*b*) 11 Vin. Abr. 249. 2 Brownl. 47.

(*c*) 11 Vin. Abr. 253. Chamberlain v. Chamberlain, 1 Chan. Ca. 257.

(*d*) Dyer, 567, a.

(*e*) Off. Ex. 54.

and after payment of the same, the surplus of such estate, by the stat. 14 Geo. 2. c. 20. shall go in a course of distribution like a chattel interest (*f*). These statutes operate equally on grants of estates *pur auter vie* in incorporeal hereditaments; as if rent be granted to A. during the life of another, the rent by virtue of these [141] provisions has been holden to continue in the representatives of the grantee dying in the lifetime of the *cestui que vie* (*g*).

Where A., tenant for three lives to him and his heirs, assigned over his whole estate in the premises by lease and release to B. and his heirs, reserving rent to A., his executors, administrators, and assigns, with a proviso that on non-payment A. and his heirs might re-enter; and B. covenanted to pay the rent to A., his executors and administrators; the rent was held payable to A.'s executor, and not to his heir, on the ground that there was no reversion to the assignor, and the rent was expressly reserved to the executor. That therefore the proviso for the heir to enter was not material, for the reservation of the rent being to the executor, the heir in case of re-entry would be a trustee for him (*h*).

In case of a tenancy from year to year as long as both parties please, if the tenant die intestate, the same interest as the deceased had shall devolve on his administrator (*i*).

If the testator were lessee for years, fish, rabbits, deer, and pigeons, shall belong to his executor as accessory chattels, partaking of the nature of their respective principals, namely, the pond, the warren, the park, and the dove-house (*k*).

If an executor hath a lease for years of land of the annual value of twenty pounds, rendering a rent of ten pounds a-year, it shall be assets only for the ten pounds over and above the rent (*l*).

A reversion of a term is vested in the executor immediately on the testator's death, and shall be assets in his hands for its utmost value (*m*). (1) If an executor renew, the new lease as well as the old shall be assets (*n*). If A. be possessed of a term as executor, and [142] he purchase the reversion in fee, he is still chargeable for the

(*f*) 2 Bl. Com. 120, 258, 259, 260. Phillips v. Phillips, Prec. in Ch. 167. S. C. 1 P. Wms. 39. Duke of Devon. v. Atkins, 2 P. Wms. 380. Vid. Atkinson admx. v. Baker, 4 Term Rep. 229. and 6 Term Rep. 291. Milner v. Lord Harewood, 18 Ves. 273.

(*g*) Harg. Co. Lit. 41 b. Fearne's Conting. Rem. 232, 233. 3 P. Wms. 264. in note. Kendal v. Micfield, Barnard, 46. Vid. also Stat. 5 Geo. 3. c. 17. Sed vid. 2 Bl. Com. 260. Vaugh. 201.

(*h*) Jenison v. Lord Lexington, 1 P. Wms. 555.

(*i*) Doe on dem. Shore v. Porter, 3 Term Rep. 13. Vid. also Gulliver on

dem. Tasker v. Burr, 1 Black. Rep. 596. Rex v. Willet, 6 Term Rep. 295. James v. Dean, 11 Ves. jun. 383. and 15 Ves. jun. 236.

(*k*) Off. Ex. 53. 11 Vin. Abr. 166. Harg. Co. Litt. 8. note 10.

(*l*) 3 Bac. Abr. 57. 11 Vin. Abr. 230. pl. 42. S. C. 5 Co. 31. Off. Ex. Suppl. 55. Shep. Touchst. 498. Body v. Hargrave, Cro. Eliz. 712. Sed vid. Cro. Jac. 545.

(*m*) 11 Vin. Abr. 240. Prattle v. King, 2 Jo. 170.

(*n*) 3 Bac. Abr. 58. Anon. 2 Chan. Ca. 208.

assets in respect of the term, although it be extinguished, so that it shall be incapable of vesting in his executor (*o*). So if the executor of the lessee surrender the lease, it shall be considered as assets, although the term be extinct (*p*).

So, where A. seised of land in fee devised it to B. for thirty-one years, for payment of debts, and appointed B. his executor, and, during the term, the fee descended on B.; it was adjudged, that, although by the descent of the inheritance, the term was merged as to him, yet that it was in *esse* as to creditors, and legatees, and should be assets in his hands (*q*). (1)

If A. have a term in right of his wife, as executrix, and he purchase the reversion, the term is extinct as to her, though she survive, but, in regard to a stranger, it shall be considered as assets in her hands (*r*). But, where A. on his marriage, demised lands to B., and B. re-demised them to A. for a shorter term, subject to a pepper-corn rent, during the life of A., and after his death, to an annual sum for the life of his wife, as her jointure, and a pepper-corn rent for the remainder of the term, and A. died, it was held, [143] that the re-demised term should not be assets to pay any of his debts, except such as affected the inheritance, inasmuch as such term was raised for a particular purpose (*s*). So, where A. on the marriage of his son B. settled a lease for years on him for life, and on the wife for life, and then on the issue of the marriage, and B. covenanted to renew the lease from time to time, and to assign it on the same trust, and B. renewed the lease in his own name, but made no assignment to the trustees and died; the lease was held to be bound by the agreement on the marriage, and that it was not assets, nor liable to his debts (*t*). Nor where a lease for years is granted on condition to be void on non-payment of rent, and the condition is broken, and the lessee afterwards dies, shall it be assets in the hands of his executor (*u*). Nor is the trust of a term made assets by the statute of frauds in the hands of the executor of *cestuy que trust* (*w*).

If the testator die in possession of a term for years, it shall vest in the executor; and, although it be worth nothing, he cannot waive it, for he must renounce the executorship in *toto*, or not at all (*x*). But this is to be understood only where the executor has assets, for he may relinquish the lease, if the property be insufficient

(*o*) Off. Ex. Suppl. 55. 11 Vin. Abr. 227. pl. 16. 21. Shep. Touchst. 497.

(*p*) 1 Co. 87 b. 11 Vin. Abr. 229.

(*q*) 11 Vin. Abr. 229. Off. Ex. Suppl. 76.

(*r*) 11 Vin. Abr. 236. Anon. Moore, 54.

(*s*) 11 Vin. Abr. 236. Baden v. Earl of Pembroke, 2 Vern. 52. 213.

(*t*) 11 Vin. Abr. 237. Goodfellow

v. Burchett, 2 Vern. 298.

(*u*) 11 Vin. Abr. 228. 2 Leon. 143.

(*w*) Vid. 11 Vin. Abr. 236 Greaves v. Powell, 2 Vern. 248. Vid. *infra* Book III. c. 9.

(*x*) Com. Dig. Admon. B. 4. B. 10. 1 Sid. 266. Fuller v. Cooke, 1 Salk.

297. Helier v. Casebert, 1 Lev. 127.

Bolton v. Cannon, 1 Vent. 271. *supra* 42.

(1) See *Nimmo's Ex.* v. *The Commonwealth*, 4 Hen. & Munf. 57.

[144] to pay the rent; yet in case there are assets to bear the loss for some years, though not during the whole term, it seems the executor is bound to continue tenant, till the fund is exhausted, when, on giving notice to the lessor, he may waive the possession (*y*).

A leasehold estate in Ireland is considered as personal estate in England; but, whether a leasehold estate in Scotland is to be regarded in the same light seems not to be settled (*z*).

If A. covenant to grant a lease for years to B. his executors, or administrators, and after B.'s death, the lease is granted to his executor accordingly, it shall be assets (*a*).

So, if the lessor covenant to renew the lease at the request of the lessee, within the term, and the lessee does not make the request, but his executors make the request within the term, the lessor shall be compelled to renew the lease; for the executors of every person are implied in himself and bound without being named (*b*).

A grant of the next presentation to a living to J. S. during his life, is limited, and shall not carry the presentation to his executors, on his dying before the church becomes void (*c*).

Among chattels real is also to be classed, the interest styled in law, the *annum, diem, et vastum*, the year, day, and waste, that is, where a party, who is not tenant to the king, is attainted of felony, all his lands and tenements in fee simple are, after his death, [145] forfeited to the crown, for a year and a day; and the king, or his grantee, and therefore his executor during such period, hath not only a right to take the rents and profits of the estate, but also to commit upon it whatever waste he pleases (*d*).

If rent be reserved on a lease for years, and the lessor die, the rent in arrear at the time of his death shall go to his executor (*e*).

A lessee for years hath only a special interest, and property in the fruit, and shade of timber trees, so long as they are annexed to the land, but he has a general property in hedges, bushes, and trees not timber (*f*), and consequently the same interest shall vest in his executor. If he be lessee without impeachment of waste, in that case he has a general property, as well in timber trees as others; but unless they are severed during the term, they shall not belong to him, or to his executor, but to the lessor, as annexed to the freehold.

Where such chattels concern corporeal hereditaments, as leases for years of houses, or lands, the executor is not deemed to be in possession of them, till he is actually entered. But, in regard to

(*y*) Off. Ex. 120. vid. infr.

(*d*) 3 Bac. Abr. 61. Off. Ex. 54.

(*z*) 11 Vin. Abr. 239. Bligh v. Earl

2 Bl. Com. 252. 4 Bl. Com. 385. 11 Vin. Abr. 175.

(*a*) Shep. Touchst. 497. infr.

(*e*) Off. Ex. 53. Off. Ex. Suppl. 119.

(*b*) Hyde v. Skinner, 2 P. Wms. 196.

3 Bac. Abr. 63.

(*c*) 11 Vin. Abr. 436. pl. 27, 28.

Mann v. Bishop of Bristol, Cro. Car.

(*f*) Com. Dig. Biens. H. 4 Co. 62 b. y. 90 b. 1 Roll. Rep. 181.

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such chattels as relate to incorporeal hereditaments, as leases of [146] tithes, the possession of the executor is necessarily constructive, because on them there can be no entry. At the instant therefore that the tithes are set out, in a place however remote, he shall be possessed of them in contemplation of law (*g*).

If the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then it appears that the executor is not in possession of the tithes, unless he enter upon the lands (*h*).

The executor of tenant from year to year, of an estate under the annual value of ten pounds, may gain a settlement by residing on it for forty days (*i*).⁽¹⁾

(*g*) Off. Ex. 108, 109. 11 Vin. Abr. (i) The King v. the Inhabitants of Stone, 6 Term Rep. 29.

(*h*) Off. Ex. 109.

(1) By the laws agreed upon in *England*, it was provided "that all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods and one-third of the land only." (Prov. Laws, App. 4th edit. 1775. 5 Sm. Laws, 416.) The act of 1700, (Purd. Dig. 262, 1 Dall. Laws, 12.) and 1705, (Purd. Dig. 264, 1 Dall. Laws, 267, 1 Sm. Laws, 57.) subjected all lands, tenements, and hereditaments whatsoever, of a decedent to be sold for his debts, upon a deficiency of the personal estate. And this liability has been held to extend to lands in the hands of a *bona fide* purchaser from the heir. *Graff v. Smith's Adm.* 1 Dall. 481. *Morris's Lessee v. Smith*, 1 Yeates, 238. 4 Dall. Rep. 119. And lands being liable in the same manner as chattels, there is no necessity for a *scire facias* against the heir and *terre tenants* to revive a judgment obtained against the testator, nor can the executor plead to a *scire facias* against him, that there are *terre tenants* whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out a *scire facias* against them, *Wilson v. Watson*, 1 Peters' Rep. C. C. 269. The act of 4th April 1797, sect. 4, (Purd. Dig. 533, 4 Dall. Laws, 157, 3 Smith's Laws, 297,) recites, that "whereas inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements, an indefinite period of time after their decease, whereby *bona fide* purchasers may be injured, and titles become insecure," and then provides, "that no such debts, except they be secured by mortgage, judgment, recognizance, or other record, shall remain a lien on said lands and tenements longer than seven years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his or her heirs, executors, or administrators, within the said period of seven years, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of seven years, shall be filed within the said period in the office of the prothonotary of the county where the lands lie: *Provided always*, That a debt due and owing to a person, who at the time of the decease of such debtor is a *feme covert*, in his or her minority, *non compos mentis*, in prison, or out of the limits of the United States, shall remain a lien on the said lands and tenements, (notwithstanding the said term be expired,) until four years after discoverture, or such person shall have arrived at the age of twenty-one years, be of sound mind, enlarged out of prison, or return into some one of the United States of America."

Upon the construction of this Act no decisions have taken place, in which creditors were directly parties, confining the protection it was intended to provide to the case of a purchaser. The case of *Miller v. Stout*, 2 P. A. Browne's Rep. 294, involved a question between the executor of the testator, who had sold certain lands by virtue of a power in the will, and certain creditors by mortgage and judgment of one of the devisees of the residue of the real estate after the debts of the testator should be paid. The facts of the case were these. *Peter*

Hinkle by his will, after several devises of parts of his real estates, and bequests of his personal property, gave his executors power to sell as much of his remaining lands as should be sufficient to pay his debts. Instead of selling, an arrangement was made between the executors, and the residuary devisees, by which each devisee was to have his part upon paying his portion of the debts, and all but one complied with the terms of the arrangement, and he in addition to his non-compliance, executed two mortgages of his interests, and gave a bond, on which judgment was entered, to a creditor, and afterwards the executor sold by virtue of the power. The Court, in determining to whom the proceeds of the sale should go, the money having been paid into Court, were of opinion that by the provisions of the will the debts of the testator were a lien or charge upon the lands designated as the fund for the payment of his debts by the testator; that any person claiming under the *devisees* must take subject to that lien, notwithstanding the provisions of the 4th sect. of the Act of April 4th, 1797; and that there was nothing to restrain the executor from selling after the expiration of seven years from the death of the testator. They therefore ordered such amount as was claimed for the payment of the testator's debts be paid to the executor, and the balance to the mortgagee.

If a devisee, or one of the heirs, loses his lands by an execution for a debt of the testator, he is entitled to contribution from the owners of the remaining part of the testator's lands, (*Per Tilghman*, C. J. 2 Binn. 299.) though they may be purchasers for a valuable consideration. *Graff v. Smith's Adm.* 1 Dall. Rep. 481. The mode of obtaining contribution, when such a case occurs, has not been settled by decision; and the doctrine of contribution itself, as respects the contribution to be made where there are several purchasers of several tracts of land, the estate of one of whom has been sold on a judgment binding the lands of all, is said to be "untrodden ground covered with difficulties." (10 Serg. & Rawle, 433.) In such a case as has been last mentioned it was decided, that the purchaser whose tract had been sold, thereby satisfying the execution, could not maintain *assumpsit* against another purchaser for contribution. *Nailer, Ex. v. Stanley*, 10 Serg. & Rawle, 450.

By the Act of 1st April, 1811, sect. 2. (Purd. Dig. 617, 5 Sm. Laws, 257.) "in all cases after the final settlement of an administration account in the Orphan's Court, if it shall appear that there are not sufficient assets to pay and satisfy the balance appearing to be due and owing from the estate of the deceased, it shall be lawful for the said Court on the application of the executors or administrators, or any others interested therein, to make an order, that so much of the real estate of which the deceased was seised or possessed at the time of his decease, shall be sold by the executors or administrators, as in the judgment of the Court shall be sufficient to pay such balance; and the Court shall likewise decree in such cases, what contribution shall be made by the heirs or devisees respectively, towards the payment of any debts chargeable on the real estate of any testator, either generally in the first instance, or where the land decreed to be sold, shall have been in any manner devised to any heir or devisee, after such sale being made." Under this Act the Orphan's Court has power to order a sale, for the payment of debts of the intestate, upon the application of one of several administrators, who has settled a final account. *Bickle, Adm. v. Young*, 3 Serg. & Rawle, 235.

A purchaser under a sale by order of the Orphan's Court, takes the land discharged from the lien of the intestate's debts, and from the lien of judgments (which are to be paid out of the proceeds of sale according to their priority in date, *Girard v. McDermott, adm.* 6 Serg. & Rawle, 128), but not from the lien of mortgages, *Molier's Lessee v. Noe*, 4 Dall. Rep. 450, 11 Serg. & Rawle, 432. The purchaser, however, is bound to see that the proceedings in the Orphan's Court are so far regular as to authorize a sale, *Messenger v. Kintner*, 4 Binn. 97. *Snyder's Lessee v. Snyder*, 6 Binn. 483. *Larimer's Lessee v. Irwin*, cited 4 Binn. 104; stated 2 Serg. & Rawle, 7. The proceedings of the Orphan's Court are not conclusive, but may be tested in ejectment, *Messenger v. Kintner, Snyder's Lessee v. Snyder*: but whenever such sales are called in question, every presumption is made by the Courts in favour of their regularity, and it lies on the party impugning them to show their irregularity, *McPherson v. Cunliff*, 11 Serg. & Rawle, 422.

SECT. II.

Of his interest in the chattels personal, animate, vegetable, and inanimate.

SECONDLY. Chattels personal are such things as are annexed to, or attendant on the person of the owner; and these, by the civil law, are denominated moveable. They are, also, to be distinguished [147] into animate, vegetable, and inanimate (*a*).

The animate are also divided into such as are *domitæ*, and such as are *feræ naturæ*, some being of a tame, and others of a wild disposition. Those of a nature tame and domestic, as sheep, horses, kine, bullocks, poultry, and the like, are capable of an absolute property, and are transmissible like all other personal chattels, to an executor. Those of a wild nature, as deer, hares, rabbits, pigeons, pheasants, partridges, and hawks, admit only of a qualified ownership. Therefore, unless they are reclaimed, that is, rendered tame by art, industry, and education, or confined so that they cannot escape, and enjoy their natural liberty, or, unless they are incapable, through weakness, of flying, or running away, they are *nullius in bonis*, not regarded in the light of private property, and consequently cannot pass to representatives (*b*). But the animals I have just enumerated, provided they are tame, shall belong to the executor. He shall also be entitled to them, although not tame, if they be taken, and kept alive in any room, cage, or other receptacle (*c*). Nor can an absolute property exist in fish at large in the water; but fish in a trunk shall go to the executor (*d*). Also, hawks, herons, and other birds, rabbits and other creatures, in [148] nests, or burrows, if too young to fly, or run away, are all to be classed among personal chattels (*e*).

(*a*) 2 Bl. Com. 387, 389. Off. Ex. 55, 56, 57.

(*c*) Off. Ex. 53, 57.

(*d*) Ibid. 53. 2 Bl. Com. 392.

(*b*) 2 Bl. Com. 390, 391. Com. Dig. Biens. A. 2.

(*e*) Off. Ex. 57. 2 Bl. Com. 394.

And it is now settled, that though the decrees of the Orphan's Court may be controverted where it exceeds its jurisdiction, yet where it is acting within its jurisdiction, the truth of what is asserted on its records cannot be denied in a collateral proceeding, nor its decrees questioned, except in cases of fraud, or where the defect plainly appears on the face of the proceedings. *Kennedy v. Wachsmuth*, 12 Serg. & Rawle, 171. *President of the Orphan's Court, &c. v. Groff*, 14 Serg. & Rawle, 181.

The surplus of lands sold under execution is to be paid to the executor or administrator, in whose hands it is assets for the payment of other debts: but where there are no debts, the heir is entitled to it; and, upon making out a proper case, the money will be ordered to be paid into Court by the sheriff, and when brought in, the Court will take care so to dispose of it as to do justice to the heir, and providing for the safety of creditors, if any should in future appear; but the sheriff is justified in paying the money to the administrator, unless he receive notice from the heir. *Guier v. Kelly*, 2 Binn. 298. *Comm. v. Rahm*, 2 Serg. & Rawle, 375.

Of the same description are hounds, greyhounds, and spaniels, and as accessory to such chattels, a hunter's horn, and a falconer's lure (*f*). And since the executor's interest is co-extensive with that which was vested in the testator, the property in all his animals, however minute in point of value, shall go to the executor, as house-dogs, ferrets, and the like (*g*); or although they were kept only for pleasure, curiosity, or whim, as lap-dogs, squirrels, parrots, and singing-birds (*h*).

An executor shall, likewise, be entitled to deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, fish in a private pond, and, according to Bracton, to bees in a hive; if, as we have before seen (*i*), the testator were lessee for years of the premises to which they respectively belong (*k*).

These various animals are no longer the property of an individual, or transmissible to his representative, than while they continue in his possession. If they obtain their natural freedom, his property instantly ceases, unless they have *animus revertendi*, which is to be known only by their custom of returning. The law, therefore, extends this possession farther than the mere manual occupation. The qualified property in a tame hawk is not divested by his pursuing his quarry in the presence of the sportsman, nor in pigeons, especially of the carrier kind, by their flying at a distance from their home; nor in deer, by their being chased out of a park, or forest; nor in bees, by their flying from the hive, if they are immediately pursued by the keeper, forester, or owner. If they stray, or fly without the knowledge of the owner, and return not in the usual manner, they are free, and open to the first occupant. But if a deer, or any wild animal reclaimed, hath a collar, or other mark put upon him, and goes and returns, at his pleasure, the owner's property in him still continues; but, if the deer has been long absent without returning, such property shall cease (*l*).

Personal effects, of a vegetable nature, are the fruit, or other parts of a plant, or tree, when severed from the body of it, or the whole plant, or tree itself, when severed from the ground; as apples or pears, which are gathered, or fallen, grass which is cut, and trees, or their branches, which are felled, or lopped (*m*).

There are, also, various vegetables, styled in law emblements, [150] which are deemed personal, and go to the executor, although they are affixed to the soil. They are so classed when they are raised annually by labour and manurance, which are considerations of a personal nature. The appellation of emblements, properly speaking, signifies the profits of sown land, but, in a larger sense, it extends to roots planted, or other annual artificial profit: it in-

(*f*) Ibid. 53, 57.

(*g*) 3 Bac. Abr. 57. Off. Ex. 58.

(*h*) 2 Bl. Com. 393.

(*i*) Supr.

(*k*) 2 Bl. Com. 393. Off. Ex. 53.

Harg. Co. Litt. 8. note 10.

(*l*) 2 Bl. Com. 392. Com. Dig. Biens.

F. 7 Co. 17 b.

(*m*) 2 Bl. Com. 389. Off. Ex. 59.

cludes corn growing, hops, saffron, hemp, flax, and, as it seems, clover, saint-foin, and every other yearly production in which art and industry must combine with nature (*m*).

On the same principle melons, cucumbers, artichokes, parsnips, carrots, turnips, and the like, belong to the executor (*n*). The executor of a tenant for life has also been held entitled to hops, although growing on ancient roots, as in the nature of emblements, in respect of the cultivation which is necessary to produce them (*o*). (1) Manure, in a heap, before it is spread on the land, is also a personal chattel (*p*).

Personal chattels inanimate are household goods, merchandize, money, pictures, jewels, garments; in short, every thing not included in the former classes, that can be properly put in motion, [151] and transferred from one place to another (*q*).

There are, also, some other interests, which fall under the description of personal chattels. Of this species is the testator's property in the public funds.

The next advowson, before it becomes void, as I have already stated, is a chattel real, but, after an avoidance, it is a chattel personal (*r*).

The executor also has an interest in the person of a debtor, in execution at the testator's suit; and without the executor's assent, the party cannot be discharged. This interest is in the nature of a personal chattel, inasmuch as the debtor is merely a pledge to secure the debt (*s*). So, a prisoner taken in war is of the same species in respect of his ransom, and, on the captor's death, shall go to his executor (*t*). Such, also, seems the interests in negro servants, purchased when captives of the nations with whom they are at war; though accurately speaking, this property of the purchaser (if it indeed continue) consists rather in their perpetual service, than in their bodies or persons; but, such as it is, it vests equally in the executor (*u*).

[152] In general, however, a servant is legally discharged by the death of his master, and the executor has no claim to his service (*v*). (2) Nor has an executor any interest in an apprentice

(*m*) 2 Bl. Com. 122, 123. Termes de la ley Embl. Off. Ex. 59. 4 Burn. Eccl. L. 255. Com. Dig. Biens. G. 1. Harg. Co. Litt. 55 b. Anon. 2 Freem. 210.

(*n*) 4 Burn. Eccl. L. 254. 2 Bl. Com. 123. Roll. Abr. 728.

(*o*) Harg. Co. Litt. 55 b. note 1. Cro. Car. 515.

(*p*) 11 Vin. Abr. 175. Sty. 66.

(*q*) 2 Bl. Com. 387, 389. Off. Ex. 57.

(*r*) 11 Vin. Abr. 173. Off. Ex. 54, 73.

(*s*) 3 Bac. Abr. 57. Off. Ex. 56.

(*t*) Off. Ex. 56. 2 Bl. Com. 402. Bro. Abr. tit. Propertie 18. L. of Test. 378.

(*u*) 2 Bl. Com. 403. Chamberlain v. Harvey, Carth. 396. Id. Raym. 147. Smith v. Gould, Salk. 667.

(*v*) Off. Ex. 56.

(1) *Thompson's Adm. v. Thompson's Ex.* 6 Munf. 514.

(2) In *Pennsylvania*, executors and administrators, upon the death of any master or mistress before the expiration of the term of any apprenticeship, may, provided the term of the indenture extend to executors or administrators, assign

bound to the testator. The contract, in regard to instruction, is in its nature merely personal, and dies with the master. Yet although an apprentice be not strictly transmissible, if, with the consent of all parties, and his own, he continue with the executor, it is a continuation of the apprenticeship (*w*); provided, in the case of a trade, it be of the same species (*x*).

An interest in the testator's literary property may devolve on the executor pursuant to several statutes (*y*). (1) An interest may, likewise, vest in him by virtue of a patent granted to the testator, for the invention of a new manufacture within the realm (*z*). (2)

It seems, also, that a carroome, or a license by the mayor of London to keep a cart, is a chattel interest, and belongs to the executor (*a*).

The interest in all these chattels is, at the instant of the testator's death, vested in the executor; and from the death of the [153] intestate, by relation, in the administrator, whether he has reduced them into his actual possession, or not, and however widely dispersed, or remotely situated, they are regarded in law as assets in his hands (*c*). Therefore, where the jury found assets in Ireland, the stating of them on the special verdict to be in Ireland, was holden surplusage (*d*). So, if an executor live in London and have left goods in Bristol, he hath such an immediate possession of the goods, that he may maintain trover for them in his own name (*e*). In like manner he shall be deemed to be in possession of a ship at sea. In short, in whatever part of the world the testator hath left effects, the executor, whether in the manual occupation of them, or not, is deemed to all intents and purposes the possessor in point of law (*f*). And, even if goods be, in fact, taken out of his possession, after he has administered, legally he

(*w*) *Baxter v. Burfield*, Stra. 1115, 1266. *Rex v. Stockland*, Dougl. 70. 1 Burn. Just. 82. et seq. 2 Ves. 35. sed vid. Off. Ex. 53, 56.

(*x*) Vid. stat. 5 Eliz. c. 4. 1 Bl. Com. 427, 428. et infr.

(*y*) Stat. 8 Ann. c. 10. 15 Geo. 3. c. 53. 8 Geo. 2. c. 13. 7 Geo. 3. c. 38. 17 Geo. 3. c. 57.

(*z*) Stat. 21 Jac. 1. c. 3.

(*a*) 11 Vin. Abr. 151. Com. Dig. Biens. B. Hunt v. Hunt, 2 Vern. 83.

(*c*) Off. Ex. 108, 109. 3 Bac. Abr. 57. Roll. Abr. 921.

(*d*) 6 Co. 46 b. 11 Vin. Abr. 230.

(*e*) 3 Bac. Abr. 58. in note. *Jenkins v. Plombe*, 6 Mod. 181. R. in evidence by Holt, C. J. *Bolland et Ux. Admx. v. Spencer*, 7 Term Rep. 358. *Munt v. Stokes*, 4 Term Rep. 563. sed vid. *Cockerill et Ux. extx. v. Kynaston*, 4 Term Rep. 277.

(*f*) 3 Bac. 57. 11 Vin. Abr. 230, 240. Shep. Touchst. 496.

over the remainder of the term of such apprenticeship to such suitable person of the same trade or calling mentioned in the indenture, as shall be approved of by the Court of Quarter Sessions of the county where the master or mistress lived. Act of 11th April, 1799. (Purd. Dig. 12. 4 Dall. Laws, 475. 3 Sm. Laws, 385.) *Kennedy v. Savage*, 2 P. A. Browne's Rep. 178.

(1) Acts of Congress of 31st May, 1790, and 29th April, 1802. *Ingersoll's Dig. Laws U. S.* 149, 151.

(2) Acts of Congress of 21st Feb. 1793, and April 17th, 1800. *Ingersoll's Dig.* 656, 660.

is not divested of them; they are still esteemed assets in his hands (*g*).

But, to give the executor a title, or to constitute assets, the absolute property of such chattels must have been vested in the testator; and, therefore, if A. take a bond in trust for B. and die, it [154] shall form no part of the assets of A. (*h*). So, if the obligee assign a bond, and covenant not to revoke the assignment, the bond shall not be included among his assets (*i*).

Nor shall goods, bailed or delivered for a particular purpose, as to a carrier to convey to London, or to an inn-keeper to secure in his inn, be assets in the hands of their respective executors. Nor, till the time for redemption is past (*k*), shall goods pledged or pawned in the hands of the executor of the pawnee, nor goods distrained for rent or other lawful cause, be regarded as the assets of the party distraining. Nor, if the testator were outlawed at the time of his death, shall his effects be so considered (*l*).

If A. consent to a disposition of the goods of the intestate, and afterwards take out administration, he shall be bound by the antecedent gift (*m*): but, if the executor make a fraudulent gift of them, they shall continue assets (*n*).

Such deeds and writings as relate to terms for years, or other chattels, or are securities for debts, belong to the executor (*o*).

[155] Also the property in the coffin, shroud, and other apparel of the dead body, remains in the executor (*p*).

Chattels, whether real or personal, may be held not only in severalty, but also in joint-tenancy. Thus, if a lease for years be granted, or a horse be given, to two or more persons absolutely, they are joint-tenants of it; and unless the jointure be severed, it shall be the exclusive property of the survivor (*q*). If the jointure be severed, as by either of them assigning his interest, or selling his share, the assignee or vendee, and the remaining lessee or part owner, shall be tenants in common without any *jus accrescendi*, or right of survivorship (*r*). So if a sum of money be given by will to two or more, equally to be divided between them, they shall be tenants in common (*s*). On the principle also of encouraging husbandry, and commerce, stock on a farm, although occupied jointly, or stock of a partnership in trade, shall always, independently of any express contract to that effect, be considered as

(*g*) Off. Ex. 113. Off. Ex. Suppl. 56. 5 Co. 33 b. 11 Vin. Abr. 230.

(*h*) 3 Bac. Abr. 58. Deering v. Torrington, Salk. 79.

(*i*) Ibid.

(*k*) Vid. Shep. Touchst. 496.

(*l*) 2 Bl. Com. 395, 396. 3 Bac. Abr. 58. Shep. Touchst. 498.

(*m*) Com. Dig. Admon. B. 10. Per two Just. Holt, C. J. contr. Whitehall v. Squire, 1 Salk. 295. S. C. 3 Salk. 161. S. C. Carth. 103. S. C.

Skin. 274. S. C. 3 Mod. 276. vid. infr.

(*n*) 3 Bac. Abr. 58. Cro. Eliz. 405.

(*o*) 3 Bac. Abr. 65. Off. Ex. 63. Jones v. Jones, 3 Bro. Ch. Rep. 80.

(*p*) 2 Bl. Com. 429.

(*q*) Bl. Com. 399. Com. Dig. Estates. K. Litt. S. 281. Harg. Co. Litt. 46 b. and 182. note 1. Lady Shore v. Billingsly, 1 Vern. 482.

(*r*) Litt. S. 321. Com. Dig. Estates. K. 5. Sym's Case, Cro. Eliz. 33.

(*s*) 1 Eq. Ca. Abr. 292.

common, and not as joint property; and therefore in these instances there shall be no survivorship, but the interest of the party dying shall vest in his executor (*t*). At law, it is true, the remedy [156] survives, yet the duty does not survive; and, therefore, if one of two joint merchants die, the action for money due to them survives for the survivor, and the executor of the deceased cannot join in an action. But the survivor, on recovery, is liable to an action of account by the executor (*u*). Such actions, however, are in a great measure superseded, by the more effectual jurisdiction of a court of equity in matters of account.

Chattels personal in the hands of an executor may, in certain cases, be changed into chattels real, and so *vice versâ*; as, if a debt be due to J. S. as executor, on statute, recognizance, or judgment, and he sue out execution, and take the lands of the debtor in extent, the personal duty is, in that case, converted into a chattel real: on the other hand, if such estate by extent, or a mortgaged term, devolve on an executor, and the debtor or mortgagor pay the money due, such chattels real are turned into chattels personal (*x*).

(*t*) 2 Bl. Com. 399. Com. Dig. Merchant D. Harg. Co. Litt: 182. and note 4. 2 Brownl. 99. Noy. 55. Jeffereys v. Small, 1 Vern. 217. Kemp v. Andrews, Carth. 170. See Lake v.

Craddock, 3 P. Wms. 161.

(*u*) Martin v. Crump, Salk. 444. Kemp v. Andrews, Show. 188.

(*x*) Off. Ex. 75. 3 Bl. Com. 420.

CHAP. III.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN SUCH
OF THE CHATTELS AS WERE NOT IN THE DECEASED'S POSSESSION
AT THE TIME OF HIS DEATH.

SECT. I.

Of his interest in choses in action.

I PROCEED now to treat of such of the testator's effects as were not in his possession at the time of his death; and in this class I am first to consider *choses*, or things in action. as well those where the cause of action accrued in the testator's lifetime, as those where it accrued after his death.

In regard to the first, the executor is entitled to the testator's debts of every description, either debts of record, as judgments, statutes, and recognizances; or debts due on special contracts, as for rent; or on bonds, covenants, and the like under seal; or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied; and all such debts, when received by the executor, shall be assets in his hands (*a*).

[158] An executor is also entitled, pursuant to stat. 4 *Ed.* 3. *c.* 7. (1) to a compensation in damages for a trespass committed on the testator's goods in his lifetime; and by the equity of that statute, for a conversion of the same, or for trespass with cattle in his close (*b*); or for cutting his growing corn, which is a chattel, and carrying it away at the same time (*c*); and by the same liberal construction of the above-mentioned statute, the executor is also entitled to a debt accrued to the testator under the stat. of 2 & 3 *Ed.* 6. *c.* 13. for not setting out tithes (*d*); to a *quare impedit*, for a disturbance of his patronage (*e*); to ejectment, for ejecting him (*f*); and, in short, to every other injury done to his personal estate previous to his death.

An executor shall also have damages for the breach of a covenant to do a personal thing (*g*); and although the covenant sound in

(*a*) Off. Ex. 65. 3 Bac. Abr. 59.
Com. Dig. Admon. B. 13.

(*b*) 3 Bac. Abr. 59. Com. Dig. Admon. B. 13. Off. Ex. 70. Lat. 168.

(*c*) Emerson v. Emerson, 1 Ventr. 187.

(*d*) Holl v. Bradford, 1 Sid. 88.
407. Moreton's case, 1 Ventr. 30.

Poph. 189.

(*e*) Off. Ex. 66, 67.

(*f*) Poph. 189.

(*g*) Lat. 168. 3 Bac. Abr. 59.

(1) In force in *Pennsylvania*, Roberts' Dig. 248. 3 Binn. 7 Serg. & Rawle, 184.

the realty, as for not assuring lands, yet if it be broken in the testator's lifetime, the executor shall be entitled to damages (*h*); (1) and the damages in any of these cases, when recovered, shall be regarded as assets.

So the executor of the assignee of a bail-bond shall recover on [159] that instrument, inasmuch as it is a vested interest (*i*).

So an executor is entitled to damages against a sheriff for permitting a party in execution on a judgment recovered by the testator to escape; even although the escape happened in the testator's lifetime (*k*). An executor may also demand damages of a sheriff for not returning his writ, and paying money levied on a *fiere facias* (*l*); or for a false return stating that he had not levied the whole debt, when in fact he had (*m*). So if the testator in his lifetime were entitled to a writ of error, or *audita querela*, or to the antiquated remedies of attain, *deceit* or *identitate nominis*, the executor has a right to recover such compensation as the testator might have claimed; and whatever he so recovers shall be assets in his hands (*n*). So, an executor is entitled to replevy goods of the testator (*o*); or to recover damages of an officer for removing goods taken in execution before the testator, who was the landlord, had been paid a year's rent (*p*). And, in general, an executor has a right to a compensation, whenever the testator's personal estate has been damaged, and the wrong remains unredressed at the time of his death.

[160] But an executor has no right to an action for an injury done to the person of the testator (*q*); nor for a prejudice to his freehold; as for felling trees, or cutting the grass, for the trees and grass are parcel of the same (*r*). (2)

An executor shall also have the benefit of any equitable title of the testator in respect to personal property; and money recovered by the executor by decree in a court of equity shall be assets (*s*).

(*h*) Com. Dig. Admon. B. 13. Com. Dig. Covenant. B. 1. *Lucy v. Levington*, 1 Ventr. 176. *Ib.* *Cooke v. Fountain*, 347. *Lucy v. Levington*, 2 Lev. 26. Off. Ex. 65.

(*i*) Com. Dig. Admon. B. 13. Forster. 367.

(*k*) Com. Dig. Admon. B. 13. *Spurston v. Prince*, Cro. Car. 297. Mod. Ca. 126.

(*l*) Com. Dig. Admon. B. 13. *Spurston v. Prince*, Cro. Car. 297.

(*m*) *Williams v. Crey*, 1 Salk. 12.

(*n*) 3 Bac. Abr. 60. Off. Ex. 71.

(*o*) 1 Sid. 82. Off. Ex. 66.

(*p*) Com. Dig. Admon. B. 13. *Palgrave v. Windham*, Stra. 212.

(*q*) Lat. 168, 169. 1 And. 243. *Mason v. Dixon*, Jon. 174.

(*r*) *Emerson v. Emerson*, 1 Ventr. 187. Off. Ex. 68.

(*s*) 3 Bac. Abr. 59. *Harecourt v. Wrenham*, Moore, 858. *Ratcliff v. Graves*, 2 Chan. Ca. 152. *Brownl.* 76.

(1) *Watson, adm. v. Blane et al.* 12 Serg. & Rawle, 131. And an administrator *cum testamento annexo* may, by virtue of the Act of 12th March, 1800, (Purd. Dig. 277, 278.) maintain ejectment on the non-payment by the vendee of the purchase money of lands sold by the former executor, under the authority of the will. *Cornill v. Green*, 10 Serg. & Rawle, 14.

(2) Nor an action of debt for the penalty, under the Act of 28th March, 1814, (Purd. Dig. 223,) establishing the fee bill. *Read v. Cist*, 7 Serg. & Rawle, 183.

In all the above-mentioned cases, I suppose the cause of action to have accrued before the death of the testator. But where it accrues after that event, the executor is equally entitled to the debt or damages.

Therefore, if A. contract to deliver certain goods to B. on a certain day, and they are not delivered in the lifetime of B., but after his death to his executor, he shall be possessed of them in that character, and they shall be assets in his hands; as in case the contract had not been performed, damages recovered for the non-performance would have been so considered (*t*). So if A. covenant with B. to grant him a lease of certain land by a certain day, and B. die before the day, and before the grant of the lease, A. is bound to grant it to the executor of B., and it shall be vested in [161] him as executor and consequently be assets (*u*). Or, if A. refuse to grant the lease, he is liable to make a compensation to the executor of B. in damages, which shall also be assets (*v*).

So where a father possessed of a term for years held of the church, renewable every seven years, assigned the lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators, and assigns; and the father covenanted to renew the lease every seven years as long as he should live. The son died and the seven years elapsed, when the executors of the son filed a bill to compel the father to renew the lease at his own expence. It was decreed accordingly (*w*).

A bail-bond may also be assigned to a deceased plaintiff's executor, and he shall be equally entitled to recover upon it, as if it had been assigned to the testator in his lifetime (*x*).

If a defendant in execution at the testator's suit escape after the testator's death, the executor shall recover damages for the escape, and the damages so recovered shall be assets (*y*). So an executor is entitled to replevy goods taken after the death of the testator (*z*). So, if A. die possessed of a term for years in an advowson, such term shall vest in his executors; and in case of their being disturbed, they shall recover damages in a *quare impedit*, and such damages shall be assets (*a*).

If an executor have an equitable title to property in that character, and he institute a suit for the same, and it be decreed to him in a court of equity, it shall also be assets (*b*).

Where the cause of action accrued before the testator's death, [162] neither debts nor damages shall be assets, till they are actually recovered by judgment, and levied by execution, or otherwise reduced into possession (*c*).

(*t*) Off. Ex. 82.

(*u*) Off. Ex. 82. 11 Vin. Abr. 231.
L. of Ni. Pri. 158. supr. 144.

(*v*) Plowd. 286.

(*w*) Husband v. Pollard, Feb. 17.
18, 19, cited 2 P. Wms. 467.

(*x*) Forres. 370.

(*y*) Com. Dig. Admon. B. 13.
Godb. 262. Vid. 1 Roll. Rep. 276.

(*z*) Off. Ex. 36.

(*a*) Ibid.

(*b*) Com. Dig. Assets C. Roll. Abr.
920. Harcourt v. Wrenham, Moore,
858.

(*c*) 11 Vin. Abr. 239, 240. 3 Bac.
Abr. 60. Jenkins v. Plume, 1 Salk.
207. Shep. Touchst. 497.

Nor shall the balance of an account stated with the executor subsequently to the testator's death be assets, unless he has recovered the same, and has it actually in his hands, for the promise to the executor on the account stated, creates no new cause of action, but ascertains merely the old cause of action which existed in the testator's lifetime (*d*). But such debts or damages recovered may be assets, although never, in point of fact, received, as if they be released by the executor. For the release, in contemplation of law, shall amount to a receipt (*e*).

Where the cause of action accrues after the testator's death, the debt or damages shall be assets immediately. As where money was had and received by the defendant to the use of the plaintiff as executor, it was held, that if the defendant received the money by the consent or appointment of the plaintiff, it was assets in his hands immediately; if without his consent, yet the bringing of the action was such a consent, as that on judgment obtained it should be assets immediately without execution (*f*).

[163] If a covenant affect the realty, and the breach be subsequent to the testator's death, the heir, and not the executor, as is hereafter shewn, shall be entitled to the damages.

If a joint merchant die, his interest in the choses in action belonging to the partnership devolves on his executor in the same manner as the other joint property (*g*). It has been even held that the executor of the deceased shall join with the surviving merchant in an action for goods carried away, or money had and received in the testator's lifetime (*h*). But it has been doubted whether the executor and surviving partner must, or can join in such action (*i*), and it has been adjudged to the contrary, and such adjudication seems now to be established, on the ground* that although the duty survive not, the remedy does survive, and therefore must be enforced by the latter alone (*k*), (1) who will still be accountable to the executor as above stated (*l*).

(*d*) 11 Vin. Ab. 240. *Jenkins v. v. Huffam*, 2 Lev. 188., and 228. S. C. Plume, 1 Salk. 207. 1 Freem. 468.

(*e*) 3 Bac. Abr. 60. *Cooke v. Jen-* (*i*) *Kemp v. Andrews*, Show. 189
nor, Hob. 66. *Brightman v. Keighley*, S. C. 3 Lev. 290, 291.
Cro. Eliz. 43.

(*f*) *Jenkins v. Plume*, 1 Salk. 207. (*k*) *Kemp v. Andrews*, Carth. 170.

(*g*) *Harg. Co. Litt.* 182. Com. Dig. *Martin v. Crump*, Salk. 444. Vid.
Merchant. D. S. C. 1 Ld. Raym. 340., and *Smith v.*
Barrow, 2 Term Rep. 476.

(*h*) Com. Dig. Merchant. D. Hall (*l*) Supr. 155.

(1) 5 Serg. & Rawle, 86. *Wallace v. Fitzsimons*, 1 Dall. Rep. 248. *McCarthy v. Nixon*, 2 Dall. Rep. 65, n. *Peters v. Davis*, 7 Mass. Rep. 257.

[164] SECT. II.

Of interests vested in him by condition, by remainder or increase, by assignment, by limitation, and by election.

AN executor may become entitled in such character to chattels real or personal by condition. As if a lease for years, or other chattel, has been granted by the testator to A., on condition that if A. do not pay a certain sum of money, or perform some other specific act, within a limited time, the grant shall be void, and the condition is not performed, such chattel shall result to the executor, and be assets (a). So, where the condition is, that the testator, or his executors, shall pay a sum of money to avoid the grant, and the executor shall pay it accordingly: As if A. mortgage a lease, or pledge a jewel, or piece of plate, and before the day limited for redemption or payment die, his executor is entitled to redeem at the day and place appointed (b). If he redeem with the testator's money, such chattels shall be assets (c). If he redeem with his own money, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the [165] sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (d). In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right (e). But if the executor disbursed his own money to redeem, after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction in respect to its value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person. But in equity, the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor (f).

Chattels which were never vested in the testator in possession, may accrue to an executor by remainder, or increase. As, if a lease be granted to A. for life, remainder to his executors for years, such remainder shall be assets in the hands of his executor, though it could never come into the possession of the testator. In like manner, where a lease for years is given by will to A. for life, and [166] on his death to B., and B. dies before A., although the term were never in B., yet it shall devolve on his executor, and

(a) Off. Ex. 76.

(b) Ibid. 76, 77.

(c) Ibid. 81.

(d) 3 Bac. Abr. 58, 59, in note. Off.

Ex. 79. 2 Fonbl. 404, n. f.

(e) 3 Bac. Abr. 58. Kellw. 63.

(f) Off. Ex. 81.

be assets. So a remainder in a term for years, though it never vested in the testator's possession, and though it continue a remainder, shall go to the executor, and shall be assets, for it bears a present value, and is capable of being sold (*g*).

So the young of cattle, or the wool of sheep produced after the testator's death, shall be assets (*h*). So if an executor of a lessee for years enter on the lands demised, the profits over and above the rent shall be so regarded (*i*).

A trade, generally speaking, is determined by the death of the trader. Articles of partnership in trade subsist not for the benefit of executors of a deceased partner, unless they contain a proviso to that effect (*k*): They may contain such proviso: (1) Or the testator may by his will direct his executors to carry on his trade after his death, either with his general assets, or appoint a specific fund to be severed from the general mass of his property for that purpose (*l*). Executors may also carry on their trade in their representative character under the direction of the Court of Chancery (*m*). In all these instances, and *a fortiori* in case the executor shall take upon himself to carry on the testator's trade, the profits of such trade shall be assets for which he shall be accountable.

An executor may also take under the description of an assignee.

Assignees are such persons as the party who has a power of assignment actually assigns to receive the chattel; as if A. contract to deliver a horse on a given day to B. or his assigns, then if B. appoint J. S. to receive the horse, J. S. is an assignee in deed (*n*).

But an executor is an assignee in law, because by law he is the representative of the testator, and is entitled to all his goods and chattels, and the benefit of all personal contracts entered into with him; and therefore in the case just mentioned, if B. die before the day limited for the delivery of the horse, it ought to be delivered to his executor; for by law he is the assignee of B. for such a purpose (*o*).

So, if a legacy is bequeathed to A. and his assigns, and A. die before payment, it shall go to his executor or administrator, as assignee (*p*). So, if A. be bound to deliver a true rental to J. S. or his assignee at the end of twenty years, and he die before that time has elapsed, A. is bound to deliver a true rental to his

(*g*) Off. Ex. 83. Vid. 2 Fonbl. 371. 110.
note (*k*).

(*h*) Off. Ex. 83.

(*i*) Com. Dig. Assets. C. Buckley v. Pirk, 1 Salk. 79. Vid. Off. Ex. 84, 85. and supr. 143.

(*k*) Pearce v. Chamberlain, 2 Vez. 33.

(*l*) Ex parte Garland, 10 Ves. jun.

(*m*) Pearce v. Chamberlain, 2 Vez. 33. Barker v. Parker, 1 Term Rep.

295. Vid. Off. Ex. 83. and 3 Bro. C. C. 552.

(*n*) Plowd. 288.

(*o*) Ibid.

(*p*) 11 Vin. Abr. 156.

executor, for he is assignee in point of law (*q*). So, if A. be bound to abide by the award of two arbitrators, and they award that he shall pay to B. or his assigns two hundred pounds before a day limited for that purpose, and B. die before the day, the money shall be paid to his executor as assignee (*r*). Or, if A. covenant to grant a lease to J. S. and his assigns by Christmas, and J. S. die before that time, and before the grant of the lease, it must be made to his executors as his assigns (*s*). So, if a lessor covenant to build a new house for the lessee and his assigns, the executor of the lessee shall have the benefit of the covenant as assignee (*t*). But where a bond was conditioned for the obligor's paying twenty pounds to such person as the obligee should by his will appoint, and he nominated J. S. his executor, but made no other appointment, it was resolved, that the executor should not have the twenty pounds, for he is only an assignee in law, and takes to the use of the testator, but that in that case the condition was in favour of an actual assignee, who takes to his own use (*u*).

[169] So, it has been held, that if A. be bound to pay ten pounds to the assignee of B. the obligee, B.'s executor shall not have the ten pounds: But that if A. be bound to pay ten pounds to B. or his assignee, then the executor of B. shall be entitled, because it was a right vested in the obligee himself (*v*).

So, before the provisions of the statute of frauds in regard to estates *pur auter vie* (*w*), if a lease were granted to A. and his assigns during the life of B. it could go only to A.'s assignee in deed, and not to his executors (*x*). And, on his failure to appoint such assignee, it was, in case of his death, open to be appropriated by the first occupant that could enter upon it during the life of *cestui que vie*.

But where on a fine the use of land was limited to A. for eighty years, with a power to A. and his assigns to make leases for three lives, to commence after the expiration of the term: A. assigned over to B.; B. died, having made his will and appointed C. his executor: C. assigned over to D.; and D. in pursuance of the power, made a lease for life: The question was, whether D. was such an assignee of A. as to have a power to make this lease, or whether it should extend only to the immediate assignees of A.; a point the more doubtful, as there had been a descent on an executor. On its being objected, that an executor should not in some cases be said to [170] be a special assignee, the court seemed inclined to the contrary; and that D. should be considered as an assignee for the purpose of making the leases in question, as well as any person that should come to the estate under the first lessee, though there should

(*q*) 11 Vin. Abr. 156. Fryer v. Gild-ridge, Hob. 10. Hob. 9. Godb. 192. Harg. Co. Litt. 210. note 1.

(*r*) 11 Vin. Abr. 157. 1 Leon. 316.

(*v*) 11 Vin. Abr. 161. Godb. 192.

(*s*) 11 Vin. Abr. 158. Off. Ex. 101.

(*w*) Vid. sup. 140.

(*t*) 11 Vin. Abr. 158. Lat. 261.

(*x*) 11 Vin. Abr. 158. Off. Ex. 101.

(*u*) 11 Vin. Abr. 156. Pease v. Mead,

be twenty mesne assignments; and on a subsequent day judgment was given accordingly (*y*).

An executor may also be entitled in respect of limitation. A contingent or executory interest, whether in real or personal estate, is transmissible to the representative of the devisee when such devisee dies before the contingency happens, and, if not before disposed of, will vest in such representative when the contingency takes place. Thus where the testator, in case his wife should die without issue by him, after her decease, which was taken to mean immediately after her decease, gave eighty pounds to his brother; and after the testator's death the brother died in the lifetime of the widow, and she afterwards died without leaving any issue: It was held that the possibility devolved to the executors of the brother, although he died before the contingency happened, and the legacy was decreed accordingly with interest from the widow's death (*z*). So where B., in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate to trustees in trust for herself during her life, and after her decease, and payment of her debts and funeral expenses, in trust for the sole and separate use of her niece alone, and not for her husband, or for such persons as she should appoint, and the niece died in the lifetime of B.: It was decided that the contingent interest belonged to the representative of the niece (*a*). And in like manner, where legacies were bequeathed to children, to be transferred to them at their respective ages of twenty-one years, or days of marriage, and that in case any of them should die under that age, or marry without consent, his or her share should go to others at their age of twenty-one years, Lord Hardwicke C. decreed that a share accruing by the forfeiture of a child's marrying without consent vested in another child who attained twenty-one, but died before such forfeiture, so as to entitle the personal representative of such deceased child to an equal share thereof with the other surviving children (*b*).

If a legacy out of the personal estate is bequeathed to A., to be paid *when* he is of the age of twenty-one years, and he dies before that time, his executors are entitled to the legacy; immediately, if it be payable with interest; if not, when A. would have come of age (*c*). But if such legacy be bequeathed to A. *at* his age of twenty-one merely, or *if* he shall attain the age of twenty-one, [172] and he die before that period, his executors have no title (*d*). (1)

(*y*) Harg. Co. Litt. 210, note 1. Howe v. Whitebank, 1 Freem. 476. 11 Vin. Abr. 158.

(*z*) Pinbury v. Elkin, 1 P. Wms. 553. Fearne's Conting. Rem. 444.

(*a*) Peck v. Parrot, 1 Vez. 236.

(*b*) Chauncy v. Graydon, 2 Atk. 616.

(*c*) 11 Vin. Abr. 160. Brown v.

Farndell. Carth. 52. Com. Dig. Chan. 3 Y. 8 Chan. R. 112. Clobberie's case, 2 Ventr. 342. Lord Pawlet's case, 366. Anon. 2 Vern. 199.

(*d*) Com. Dig. Chancery, 3 Y. 8. Clobberie's case, 2 Ventr. 342. Hutchins v. Foy, Com. Rep. 2d ed. 719.

(1) See *Patterson v. Hawthorn*, 12 Serg. & Rawle, 112.

This distinction with respect to interests arising out of personal property, as far at least as they are of a *legatory* nature, although it be explained, and in some degree corrected by the more modern cases, is in substance established by a series of authorities (*e*); but although the legacy out of the personal property be left to A. *at* twenty-one, yet if interest is given before the time of payment, that circumstance is held to be evidence of an intention to vest the legacy (*f*). But such presumption does not appear to be formed from that circumstance in respect to any interests but those of a legatory nature, although the fund be merely personal: for it hath not been admitted in cases of portions for younger children to be raised out of such fund at twenty-one, with interest in the mean time for maintenance and education (*g*).

So with respect to all interests arising out of land, the rules on [173] the subject are totally different: for whether the land be the primary or auxiliary fund, whether the charge be made by deed or will, as a portion or a general legacy for a child or a stranger, with or without interest, the general rule is, that charges on land payable on a future day shall not be raised where the party dies before the day of payment (*h*). (1) This rule however is subject to many exceptions; as, where the time of payment is postponed from the circumstances, not of the person but of the fund. As, where a term was created for daughters' portions, commencing after the death of the father and mother, on trust to raise the portions from and after the commencement of the term, and the father died leaving a daughter, the portion was decreed to be vested, but not raisable during the life of the mother (*i*).

(*e*) 2 P. Wms. 612. Mr. Cox's note 1. *Lampen v. Clowbery*, 2 Ch. Ca. 155. *Smell v. Dec*, 2 Salk. 415. 1 Eq. Ca. Abr. 295. *Barlow v. Grant*, 1 Vern. 255. *Stapleton v. Cheales*, Prec. Chan. 318. 3 Bro. P. C. 337. 2 Eq. Ca. Abr. 548. *Lowther v. Condon*, Barnard. 329. *Steadman v. Palling*, 3 Atk. 427. *Goss v. Nelson*, 1 Burr. 227. *Barnes v. Allen*, 1 Bro. Ch. Rep. 181. *Monkhouse v. Holme*, ib. 298. *Benyon v. Maddison*, 2 Bro. Ch. Rep. 75. *May v. Wood*, 3 Bro. Ch. Rep. 471.

(*f*) 2 P. Wms. 612. note 1. *Collins v. Metcalfe*, 1 Vern. 462. *Stapleton v. Cheele*, 2 Vern. 673. S. C. Prec. Ch. 318. *Atkins v. Hiccocks*, 1 Atk. 501. *Van v. Clark*, 1 Atk. 512. *Neale v. Willis*, Barnard. 43. *Foncrean v. Foncrean*, 3 Atk. 645. S. C. 1 Vez. 118. *Walcot v. Hall*, 2 Bro. Ch. Rep. 305.

(*g*) 2 P. Wms. 612. note 1. *Targus v. Puget*, 2 Vez. 207. *Hubert v. Par-*

sons, ib. 262. *Goss v. Nelson*, 1 Burr. 227.

(*h*) *Pitfield's case*, 2 P. Wms. 515. 612. note 1. *Lampen v. Clowbery*, 2 Ch. Ca. 155. *Poulet v. Poulet*, 1 Vern. 204. 321. *Smith v. Smith*, 2 Vern. 92. *Yates v. Phittiplace*, ib. 416. *Carter v. Bletsoe*, Prec. Ch. 267. *Tournay v. Tournay*, ib. 290. *Stapleton v. Cheales*, ib. 318. *Jennings v. Looks*, 2 P. Wms. 276. *Anon. Mosel*. 68. *Neeve v. Kecke*, 9 Mod. 106. *Gordon v. Raynes*, 3 P. Wms. 134. *Bradley v. Powell*, Ca. Temp. Talb. 193. *Prowse v. Abingdon*, 1 Atk. 482. *Hall v. Terry*, ib. 502. *Van v. Clark*, ib. 512. *Boycot v. Cotton*, ib. 555. *Richardson v. Greese*, 3 Atk. 69. *Attorney-General v. Milner*, ib. 112. *Oldfield v. Oldfield*, 1 Bro. Ch. Rep. 106. in note, 124. in note. *Ashburne v. McGuire*, 2 Bro. Ch. Rep. 108.

(*i*) 2 P. Wms. 612. note 1. *Lowther v. Condon*, 2 Atk. 127. 130. S. C. Bar-

And where a legacy was charged upon real estate, to vest immediately on the testator's death, but to be paid to the legatee on attaining 21, and the interest to be applied in the mean time for maintenance, and the legatee died before attaining 21: it was held, that the express direction that the legacy should vest on the death of the testator, prevented its sinking for the benefit of the devisee, and that the personal representative of the legatee was entitled to the legacy (*i*).

In respect to those cases where portions have been given out of land, and no time of payment expressed, it seems difficult to reconcile the determinations. According to one class, their interest is vested immediately, and transmissible: according to another, [174] such portions shall not vest, if the children die before they want them (*k*).

But if lands be devised for payment of portions, and one of the children entitled to a portion die after it becomes due, though before the lands are sold, the personal representative of such child will clearly be entitled to the money (*l*).

In those cases, in which both the real and personal estates are charged with a legacy, as far as the executor claims out of the latter he shall succeed according to the rule of the spiritual court where such claim is determinable, though the infant legatee die before the time of payment, and consequently the legacy, so far as it is charged upon the land, shall sink (*m*). (1)

An executor may also claim by election; as where the testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use. If nothing passes to the grantee of a chattel before his election, it ought to be made in his

nard. 327. *Emes v. Hancock*, 2 Atk. 507. *Butler v. Duncomb*, 1 P. Wms. 457. *Pitfield's case*, 2 P. Wms. 513. *Ca. Temp. Talb.* 117. *King v. Withers*, 3 P. Wms. 414. *Sherman v. Collins*, 3 Atk. 319. *Hutchins v. Fitzwater*, Com. Rep. 716. *Hodgson v. Rawson*, 1 Vez. 44. *Dawson v. Killet*, 1 Bro. Ch. Rep. 119, 124, in note. *Tunstal v. Bracken*, Amb. 167. *Embrey v. Martin*, ib. 230. *Smith v. Partridge*, ib. 266. *Mannerling v. Herbert*, ib. 575. *Fawsey v. Edgar*, 1 Bro. Ch. Rep. in note. *Thomson v. Dowe*, ib. 193. in note.

(*i*) *Watkins v. Cheek*, 2 Sim. and

Stu. 199.

(*k*) *Cowper v. Scott*, 3 P. Wms. 119. *Wilson v. Spencer*, ib. 172. 2 P. Wms. 612. note 1. *Brewin v. Brewin*, Prec. Ch. 195. *Warr v. Warr*, ib. 213. *Ld. Teynham v. Webb*, 2 Vez. 209. 1 Bro. Ch. Rep. 124, in note. *Lord Finchinbroke v. Seymour*, ib. 395. and vid. 2 Atk. 133. and 11 Vin. Abr. 163, 164. *Whitmore v. Wild*, 1 Vern. 326, 347. *Gifford v. Goldsey*, 2 Vern. 35. *Earl Rivers v. Earl Derby*, ib. 72.

(*l*) 11 Vin. Abr. 163. *Bartholomew v. Meredith*, 1 Vern. 276.

(*m*) *Duke of Chandos v. Talbot*, 2 P. Wms. 613.

(1) See 12 Serg. & Rawle, 114. But where a testator directed that all the rest and residue of his estate, "of what kind or nature soever, whether in possession, remainder or reversion," should be sold by his executors "at any time, and in any manner he or they shall think proper," and the moneys arising from such sales to be paid to particular persons (his sons), the interest of the legatees was held to be a *vested* one, which their deaths before the sale did not defeat. *Tazewell v. Smith's adm.*, 1 Rand. Rep. 513.

lifetime (*n*). As if A. give to B. such of his horses as B. and C. shall choose, the election ought to be made in the lifetime of B. (*o*). But where an interest vests immediately by the grant, the election may be made by the executor, as well as by the party himself (*p*). As, if a fine be levied of a hundred acres, and the conusee grant fifty to the conusor for a term of years, his executor may choose which fifty he will have. So if A. gives one of his horses to B. and C., B. may elect after the death of C., which he will take, for an [175] interest vested in them immediately by the gift (*q*). So if the election determine only the manner or degree in which the thing shall be taken, the executor, as well as the grantee himself, may make it; for in such case also there is an immediate interest (*r*). As, if a lease be granted to A. for ten or twenty years, as he shall elect, the executor is entitled to the election.

(*n*) Com. Dig. Election B. Harg.
Co. Litt. 145.

(*o*) 1 Roll. Abr. 726.

(*p*) Harg. Co. Litt. 145.

(*q*) 1 Roll. Abr. 725.

(*r*) Harg. Co. Litt. 144 b.

CHAP. IV.

OF CHATTEL INTERESTS WHICH DO NOT VEST IN THE EXECUTOR OR ADMINISTRATOR.

SECT. I.

Of chattels real which go to the heir; and also touching money considered as land, and land as money.

I PROCEED now to inquire under what special circumstances chattel interests shall go to the heir of the last proprietor.

The principle which generally pervades the cases in which the heir, as distinguished from the executor, shall be entitled to chattels, is this—that they are so annexed to and consolidated with the inheritance, that they shall accompany it wherever it vests (*a*).

And, first in regard to chattels real: if A. seised in fee grant an estate tail, or a lease for life or years, reserving rent, such rent as accrues after his death, being incident to the reversion, shall go to his heir, and not to his executors (*b*), although they are expressly named in the covenant (*c*). If A. seised in fee make a lease, re-[177] serving rent to him, his executors and assigns, and die, the rent is determined, for the executors are not entitled to it, inasmuch as they are strangers to the reversion, which is an inheritance, nor shall it go to the heir, because he is not named (*d*). But if A. seised in fee make a lease for years, reserving rent to him and his assigns, or to him, his executor and assigns, during the term, although there be decisions to the contrary (*e*), the words, “during the term,” shall be sufficient to carry the rent to the heir. Where the rent is so reserved, the intention of the parties is clearly expressed, that the lessee is to pay the same during the continuance of the demise (*f*).

In case the lease reserve rent at Michaelmas, or ten days after; if the rent be not paid at Michaelmas, and, before the ten days are expired, the lessor dies, his heir, and not his executor, shall receive

(*a*) 2 Bl. Com. 427, 428.

(*b*) 3 Bac. Abr. 62. Harg. Co. Litt. 47.

(*c*) Harg. Co. Litt. 47. note 9. Drake v. Munday, Cro. Car. 207.

(*d*) Harg. Co. Litt. 47. 2 Roll. Abr. 450. Sacheverel v. Frogate, 1 Vent. 161.

(*e*) See Noy. 96. 12 Co. 36. Richmond v. Butcher, Cro. Eliz. 217. 3 Bac. Abr. 63. in note.

(*f*) Harg. Co. Litt. 47. note 8. ibid. 202. 3 Bac. Abr. 62. Sacheverel v. Frogate, 2 Saund. 367. S. C. 1 Vent. 148, 161. Sacheverel v. Frogate, Raym. 213. 2 Lev. 13. S. C.

the rent: for although it were in the election of the lessee to pay it at Michaelmas, yet the ten days after are the true legal term, and consequently the rent was not legally due before that period of time, and therefore is no chattel (*g*). So if the lessor die on the day on which the rent is payable, after sunset, and before midnight, the heir, and not the executor, may demand the rent, for it is not in strictness due till the last minute of the natural day, although it [178] may be more convenient to pay it before (*h*). So where rent is granted to A. and his heirs for life, and the lives of B. and C., the heir shall have the rent as a party specially nominated, and as heir by descent (*i*). So, although, for the arrears of a *nomine pœnæ*, or penalty from non-payment of rent, the grantee himself, and therefore his executors, may have an action of debt, yet such penalty, as an incident to the rent, shall descend to the heir (*k*). So a term for years in trust to pay debts, afterwards to attend the inheritance, shall go to the heir, and not to the executor (*l*). So if a term be raised for a certain purpose, and that purpose be answered, the heir shall have the beneficial interest in the same, whether it be so expressed or not (*m*); but he shall take it as a term, and consequently as a chattel (*n*). So an annuity, although a chattel interest, is descendible to the heir (*o*). So where A., the *cestuy que trust* of a term in Blackacre, afterwards purchased the fee in his own name, and devised Blackacre in fee to B., his heir, whom he made his executor and residuary legatee, it was held that on the death of B. the term should go with the fee to B.'s heir, and not to his personal representative (*p*). So if an estate *pur autre vie* be limited to A., his heirs, executors, administrators, and assigns, and be not devised, it shall descend to the heir as a special occupant (*q*).

But if a debt be owing to A., and, in satisfaction of it, the debtor grants him an annuity, charged on lands for the grantor's own life, and redeemable, such annuity shall be part of A.'s personal estate (*r*). So a term conveyed as a fee by lease and release to J. S. and his heirs by the word "grant," although it cannot operate as a fee to vest in the heirs of J. S., yet shall go to his personal re-

(*g*) 3 Bac. Abr. 63. 10 Co. 127.

(*h*) 3 Bac. Abr. 63. Harg. Co. Litt. 202. note 1. Duppa v. Mayo, 1 Saund. 287. Ld. Rockingham v. Oxenden, Salk. 578. and vid. 1 P. Wms. 177. S. C.

(*i*) 11 Vin. Abr. 168. Bowles v. Poore, Cro. Jac. 282. Vid. 2 Bl. Com. 259.

(*k*) 11 Vin. Abr. 168. Harg. Co. Litt. 162 b.

(*l*) 11 Vin. Abr. 172. Countess of Bristol v. Hungerford, 2 Vern. 645. Com. Dig. Biens. B. 2 Ca. Ch. — v. Langton, 156, 160.

(*m*) 11 Vin. Abr. 169. Anon. 2

Vent. 359.

(*n*) 11 Vin. Abr. 171. Levet v. Needham, 2 Vern. 139.

(*o*) 11 Vin. Abr. 153. Arg. 10. Mod. 237. Vide also 11 Vin. Abr. 146. pl. 25. Co. Litt. 374 b. Earl Stafford v. Buckley, 2 Vez. 170. Countess of Holderness v. Marq. of Carmarthen, 1 Bro. C. Rep. 377. 2 Bl. Com. 40.

(*p*) Goodright v. Sales, 2 Wils. 329. vid. supr. 7.

(*q*) Atkinson Admx. v. Baker, 4 Term Rep. 229. Vid. supr. 140.

(*r*) Com. Dig. Biens. C. Longuet v. Scawen, 1 Vez. 402.

presentative (*s*). So if a lessee for twenty years make a lease for ten years, reserving a rent during the last-mentioned term to him and his heirs, it shall be void as to his heir, and shall belong to his executors (*t*). So if A. possessed of a term for years devise it to B. for life, remainder to the heirs of B., it seems that on B.'s death it shall go to his executor, and not to his heir (*u*). So if A. seised in fee make a lease for years, reserving rent, and devise the rent to B.; B.'s executor, and not his heir, shall be entitled to the rent, because B. had no more than a chattel interest (*v*). So [180] where a copyhold estate was granted to A. for the lives of A. B. and C., and A. died intestate, it was held that his administrator should have the estate during the lives of B. and C. (*w*).

So a lease granted by a copyholder for one year *only* shall be no forfeiture, for it is warranted by the general custom of the realm, and shall be accounted assets in the hands of the executor of the lessee (*x*).

If A. grant a rent in fee to J. S., with a proviso that, if it be in arrear, the grantee may enter the lands, and retain till he be satisfied; the power of entry is an inheritance, and descends to the heir: but when entry is made, the party has merely a chattel interest in the lands, which, with the arrears, shall go to his executor (*y*).

If the grantee of a rent in fee take a lease for years of the lands out of which the rent issues, and die, his executor shall have the land, and the heir is precluded from the rent (*z*).

So, a bond given by one parcener to pay the other, her executors or administrators, an annual sum during the life of J. S. for [181] owelty of partition, or as a compensation for her share being of the less value, shall go to the executor, and not to the heir: because in such case there is no grant of a rent, but a mere contract, and therefore the obligor had an election, either to pay the same, or to forfeit her bond (*a*).

Money covenanted to be laid out in land, we have seen (*b*), shall descend to the heir. Nor is the case varied by the covenants being voluntary; as, if A. without any consideration covenant to lay out money in a purchase of land to be settled on him and his heirs, a court of equity will compel the execution of such contract, though merely voluntary; for in all cases where it is a measuring east between an executor and an heir, the latter shall in equity have the preference (*c*). But in such cases, if there be proof that the

(*s*) 11 Vin. Abr. 153. Marshall v. Frank, Chan. Prec. 480.

(*t*) Sacheverel v. Frogate, 1 Vent. 161.

(*u*) 11 Vin. Abr. 155. Davis v. Gibbs, 3 P. Wms. 29.

(*v*) 11 Vin. Abr. 145. Dyer 5 b. note 1. *ibid*. Ards v. Watkin, Cro. Eliz. 637. 651. Moore, 549. S. C.

(*w*) 11 Vin. Abr. 151. in note. Howe v. Howe, 1 Vern. 415.

(*x*) 11 Vin. Abr. 146. Poph. 188.

Harg. Co. Litt. 59. note 4. 4 Co. 26. 9 Co. 75 b. Mathewes v. Weston, W. Jo. 249. Litt. Rep. 233.

(*y*) 11 Vin. Abr. 147. Jemmot v. Cooly, 1 Lev. 171. Errington v. Hirst, Raym. 125. 158. 1 Sid. 223. 262. 344.

(*z*) 11 Vin. Abr. 147. Lit. Rep. 59. (*a*) 11 Vin. Abr. 150. Hulbert v. Hart, 1 Vern. 133.

(*b*) Supr. 8.

(*c*) Edwards v. Countess of Warwick, 2 P. Wms. 176.

party absolutely, and in all events entitled to the money, intended to give it the quality of a personal estate, then it shall go to his executor. Whether the mere circumstance of the fund remaining in his hands in the shape of money shall of itself be evidence of such intention, and if not, whether the heir has any equity against the personal representative in this respect, are points in which the cases seem in some measure to differ. But they all agree that even slender proof of the intention will decide the question (*d*).

Thus, by articles before marriage, securities for moneys amounting to the sum of 1,400*l*. were assigned to trustees, and agreed to be invested in land to be settled on the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the right heirs of the husband, some of the securities were continued unaltered, but part of the money settled was invested on other securities expressly in trust for the husband, his executors and administrators. The husband died without issue, having made his will, by which he devised some of his lands to his wife, and the rest of his real estate in Yorkshire and elsewhere to J. S., and all his personal estate and all his securities for money to his wife, whom he appointed executrix. It was held that so much of the 1,400*l*. as was subsisting upon the securities on which it was originally placed, or on any other securities where no new trust had been declared, ought to be considered as real estate; but that such part as was called in by the testator, and afterwards placed out upon securities upon a different trust, should be taken to be personal estate; upon the principle, that as there was no issue of the marriage, it was in the power of the husband to alter and dispose of the settled property as against the heir at law, though not against the wife, and yet the placing it out upon different trusts was an alteration of the nature of it, and his declaring the trust to his executors seemed equivalent to his declaring that it should not go to his heir (*e*).

But where A. executed articles of agreement for the purchase of land of B. and paid B. six hundred pounds; but B. paid A. interest for the money, and A. paid B. rent for the premises, it was held, that on A.'s dying before the conveyance, his executor was entitled to the six [182] hundred pounds, as part of his personal estate (*f*). On the other hand, where A. died intestate, leaving two daughters, and after his decease the widow laid out the sum of four hundred pounds, part of his assets, in land, and settled it to herself for life, remainder to her two daughters in tail, remainder to her own right heirs: the administrators of the daughters claimed from the heir at law of the widow two-thirds as personal estate, and it was proved

(*d*) *Edwards v. Countess of Warwick*, 2 P. Wms. 175. and note 1. *Chichester v. Bickerstaff*, 2 Vern. 295. *Lingen v. Sowray*, 1 P. Wms. 172. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211. S. C. Ca. Temp. Talb. 80. *Guidot v. Guidot*, 3 Atk. 254. ib. *Crabtree v. Bramble*, 680. 5 Bro. P.

C. 269. *Bradish v. Gee*, Ambl. 229. *Hewitt v. Wright*, 1 Bro. Ch. Rep. 86. *Pulkney v. Earl Darlington*, 223.

(*e*) *Lingen v. Sowray*, 1 P. Wms. 172.

(*f*) 11 Vin. Abr. 119. 2 Chan. Rep. 138.

that the same four hundred pounds were applied in the purchase: although the Master of the Rolls decreed for the administrators, yet on appeal the Lord Keeper reversed the decree on the ground, that money could not be specifically distinguished, nor followed when invested in a purchase (*g*). But where an executor in trust for an infant of a lease for ninety-nine years determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir (*h*). So where trustees purchased lands in fee-simple with the infant's money, and the infant died in his minority, it was held that the land should be accounted part of the personal estate, and should go to his administrator (*i*). So, where committees of a lunatic invested part of his personal estate in the purchase of lands in fee, the court declared it should be deemed personal property, decreed an account, the land to be sold, and the money to be divided among the next of kin. For it shall not be in the power of a guardian or trustee to change the nature of the estate. (1) But it appears, that if in such case the trustees obtain a decree in equity for the purchase, the court will maintain its decree, and then the estate shall go to the heir, and not return to the personal fund, if there be no ground to impeach the trustees of fraud (*k*).

With respect to mortgages, since courts of equity consider such contracts as merely personal, the mortgage money is in general held to be part of the personal estate, and to belong to the executor of the mortgagee. But, under special circumstances, it shall be regarded in the light of real property, and shall go to the heir (*l*).

At law, if the condition or defeasance of a mortgage of inheritance make no mention either of heirs or executors, to whom the money shall be paid, the money ought to go to the executors, for, being originally derived out of the personal estate, in natural justice, it ought to return thither. If the defeasance appoint the money to be paid either to the heir or executors, and the mortgagor pay the money at or before the day, he may [184] elect to pay it either to the heir or the executor. If the day of

(*g*) 11 Vin. Abr. 153. *Kendar v. Milward*, 2 Vern. 440.

(*h*) 11 Vin. Abr. 155. *Witter v. Witter*, 3 P. Wms. 99.

(*i*) 11 Vin. Abr. 151. 2 Chan. Rep. 377.

(*k*) 11 Vin. Abr. 51. *Awdley v. Awdley*, 2 Vern. 192. *Thomas v. Kemish*, 2 Freem. 209. *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435.

(*l*) *Powell on Mortgages*, 2d vol. 682—698.

(1) If the guardian of a minor child of an intestate accept for his ward a part of the real estate of the intestate, adjudged to the minor by the Orphan's Court under proceedings in *partition*, had pursuant to the provisions of the Act of 19th April, 1794, sect. 22. (Purd. Dig. 378.) and enter into recognizances for the payment of the shares of the other children, the ward is bound by the act of the guardian, and cannot, on arriving at full age, disaffirm it. *Case of Gelback's Appeal*, 8 Serg. & Rawle, 295.

payment, be past, and the mortgage be forfeited, all election is gone; for at law there exists no right of redemption. There can be a redemption only in equity, and equity will not revive the election; but considers the case the same as if neither heir nor executor had been named. And as in that case the law will give it to the executor; equity, which ought to follow the law, will decree it to the same person. Hence, therefore, when the security descends to the heir of the mortgagee attended with an equity of redemption, as soon as the mortgagor pays the money, the land shall belong to him, and the money only to the mortgagee, which is merely personal, and so accrues, and is payable to his executor (*m*). Nor will it appear inequitable that the heir should be decreed to make a reconveyance without having the money which comes in lieu of the land, if it be considered that the land was no more than a security, and that, after payment of the money, a trust results for the mortgagor, which the heir of the mortgagee is bound to execute.

Nor is it material that the executor of the mortgagee has assets without such money. Assets shall not be the measure of justice between the parties. The heir either ought to have the money if there were no assets, or ought not to have it although there were. Nor is the principle varied by there being no personal covenant on [185] the part of the mortgagor to pay the money: for although the claim of the mortgagee's executor would be strengthened by such a covenant, yet it shall avail him without it (*n*). And although a mortgage in fee be conditioned that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns, and the mortgagee die before the forfeiture of the mortgage, whereby the mortgagor has his election at law to pay the money to either, yet in equity it shall belong to the executor; for, in mortgages in fee, the mortgagee's heirs are trustees for his personal representatives (*o*). In short, mortgages are deemed in equity to be mere chattel interests, and to belong to the executor of the mortgagee, unless his intention to the contrary be declared in express terms by the contract (*p*), or by his will, or be evidently implied by his conduct: As, if he foreclose, or procure a release of the equity of redemption, and obtain actual possession of the premises. So, where a mortgage in fee descended on the heir at law of the mortgagee, and the personal representative of the mortgagee ten years after the money had been paid to such heir, filed a bill for the same, it was decreed to him, but without interest (*q*).

Nor shall a legacy to the executor, although expressed to be pay-

(*m*) *Waring v. Danvers*, 1 P. Wms. 295. See also *Fonbl.* 255.

(*n*) 11 Vin. Abr. 148. and in note. *Baker v. Baker*, 2 Freem. 143. See also 2 P. Wms. 455.

(*o*) Sir Thomas Littleton's case, 2

Ventr. 351. Barnard. 50. *Rightson v. Overton*, 2 Freem. 20. Harg. Co. Litt. 208 b. note 1.

(*p*) Off. Ex. Suppl. 47. Harg. Co. Litt. 210.

(*q*) *Turner's case*, 2 Ventr. 348.

able after debts, and the other legacies, affect his title to money [186] due to the testator on mortgage. Thus where a mortgage in fee, after bequeathing several legacies, gave one hundred pounds to his executor, with a direction that his legacy should not be paid till the testator's debts and other legacies were discharged, and there was no deficiency of assets, yet the court decreed in favour of the executor against the heir (*p*). So, if the mortgagor shall fail to redeem, the heir of the mortgagee shall convey the land to the executor: As where the mortgage was forfeited, though the heir of the mortgagee were in possession by descent, and there were no deficiency of assets, on the mortgagor's not offering to redeem, the heir of the mortgagee was decreed to make such conveyance: for since the money, as part of the personal estate, would have gone to the executor, he was held entitled to the land as a recompence (*q*). So, where a copyhold was mortgaged by surrender to A., who was admitted tenant, and died, leaving B. his son, and heir, and executor: B. entered, and was also admitted, and afterwards by his will, but without any surrender to the use of the same, devised it to C.: on B.'s death, C. became the personal representative of A., and exhibited his bill against D., who was heir at law of A. and B., and who claimed this as a real estate on a variety of grounds: that the forfeiture had been so long incurred; that two descents had been cast; that more was due on the estate than its value; that the mortgagor had by his [187] answer refused to redeem; and submitted to be foreclosed; and that the devise by B. to the plaintiff was void at law for want of a surrender to the use of the will: Yet it was decreed to C., as the personal representative of A., inasmuch as there was no foreclosure, nor release of the equity of redemption in the lifetime of the mortgagee, and on appeal the decree was affirmed (*r*).

If on a mortgage being forfeited, the mortgagor release to the heir of the mortgagee in fee, yet the executor of the mortgagee shall have the benefit of the estate, although there be no debts. So, in the case of a foreclosure of a mortgage, or that the mortgage be of so ancient a date, as in the ordinary course of the court it is not redeemable, it shall belong to the personal representative of the mortgagee; for unless the mortgagee were actually in possession, it shall be considered as personal estate (*s*). So, where a wife had a mortgage in fee of a copyhold, and died leaving issue, and the issue was admitted, and died, and then the husband, as administrator to his wife, claimed the copyhold as a mortgage, and consequently part of the wife's personal estate; it was decreed to him against the heir at law, although the latter had been admitted (*t*). So, a mortgage of an inheritance to a citizen of London hath been

(*p*) Canning v. Hicks, 2 Ca. Cha. 187. S. C. 1 Vern. 412.

(*q*) Ellis v. Guavas, 2 Chan. Ca. 50. Canning v. Hicks, 187.

(*r*) Tredway v. Potherley, 2 Vern.

367. 1 Eq. Ca. Abr. 273. 328. Vid. Awdley v. Awdley, 2 Vern. 193.

(*s*) Awdley v. Awdley, 2 Vern. 193.

(*t*) Turner v. Crane, 1 Vern. 170.

held to be part of his personal estate, and divisible according to the custom (*u*).

[188] But if the possessor of the estate conceive himself to hold it in fee, his interest will not be considered as personal against his evident intention ; as if an absolute sale of an estate in mortgage be fraudulently made by the mortgagee to a third person, the purchase money, on its being refunded by the vendor after the death of the vendee, will go to his heir; for the intention of the vendee was to alter the nature of his property, and to invest the money in the purchase of land, and therefore the court will consider it as real property (*x*). So, if it appear to be the intention of the mortgagee that the mortgage should pass by devise as a real estate, the executor will not be entitled (*y*). As, where the testator had several mortgages, and among the rest a mortgage in fee of lands in Whiteacre, and devised his mortgages to his two daughters, their executors and administrators, and his lands in Whiteacre, on which he had entered on forfeiture of the mortgage, to them and their heirs: M., one of the daughters, died without issue; H., her husband and administrator, claimed a moiety of the lands in Whiteacre as a mortgage not foreclosed, nor of which the equity of redemption was released, and therefore part of his wife's personal estate; but it was held, that although it were a mortgage, as between a mortgagor and mortgagee, and therefore personal; yet the testator's intention was, that it should pass to his daughters as a real estate to them and their heirs, and that inasmuch as M. was dead without issue, it descended to her sisters as her heirs at law, [189] and that H. was entitled to no part of the same in the nature of personal estate (*z*). But where a mortgage was devised as real estate after a decree of foreclosure *nisi*, that is, unless cause were shewn to the contrary, it was held to be personal estate for payment of debts, if the assets were insufficient, although considered as real estate between the deviser and devisee (*a*). A mortgage will not pass as land under a general description applicable to it in point of locality, if from other circumstances it be evident that the owner regarded it as personal property (*b*).

Where money secured by mortgage, to which the executor was entitled at law, was articulated to be laid out in land, and settled on the issue of the marriage, on special verdict it was adjudged to be bound by the articles (*c*). And it has been held, that the heir of a mortgagee in fee, if he pay the executor the mortgage money, may take the benefit of a foreclosure to himself (*d*).

If the parson of a church be seised of the advowson in fee, and die, in such case the heir, and not the executor, shall present; be-

(*u*) *Thornborough v. Baker*, 1 Chan. Ca. 285. *Winn v. Littleton*, 1 Vern. 4.

(*x*) *Cotton v. Iles*, 1 Vern. 271.

(*y*) *Martin v. Mowlin*, 2 Burr. 969.

(*z*) *Noys v. Mordant*, 2 Vern. 381.

S. C. Gilb. Rep. in Chan. 2. *S. C. Chan. Prec.* 265.

(*a*) *Garret v. Evers*, *Moseley*, 364. and see *Silberschildt v. Schiott*, 3 Ves. and Bea. 45.

(*b*) *Martin v. Mowlin*, 2 Burr. 969.

(*c*) *Vid. Lechmere v. Earl of Carlisle*, 3 P. Wms. 217.

(*d*) *Clarkson v. Bowyer*, 2 Vern. 67

cause at the same time the avoidance rests in the executor, the inheritance descends to the heir; and where two titles concur in an [190] instant of time, the elder shall be preferred (*e*). But if A. be seised of an advowson in gross, or in fee appendant to a manor, and an avoidance happen in his lifetime, his executor, and not his heir, shall present, inasmuch as it was a chattel vested, and severed from the manor (*f*). But if the next presentation be granted to A., his heirs and assigns, it is clearly a mere chattel, notwithstanding the word "heirs." It is but one turn, and where the thing is a chattel, the word "heirs" cannot make it an inheritance (*g*). So if a man grant the two next presentations of a church, they are chattels, and if the grantee die the executor shall have them, and not the heir (*h*).

If a party having the inheritance of tithes die after the tithes are set out, they shall go to his executor, and not to his heir (*i*).

The interest denominated the year, day, and waste, which has been already explained (*k*), is but a chattel; and although granted by the crown to A., and his heirs, shall go to his executors (*l*).

In regard to the estate of a lunatic, the Court of Chancery will change the nature of the property so as to alter the succession, if [191] the interest of the owner, which is solely considered, shall require it. Between the real and personal representatives of a lunatic there is no equity. They are both volunteers, and must take what they find at his death in the condition in which they find it. Thus the produce of timber on a lunatic's estate, cut and sold by an order of the court, founded on the master's report that it would be for the benefit of a lunatic, as some of the timber was in a state of decay, and injuring the rest, was on his death held to be personal assets, and incapable of a transmutation for the benefit of the heir (*m*).

Charters and deeds, court rolls, and other evidences of the land, as well as the chests in which they are usually kept, shall pass with the land to the heir, and shall not go to the executor (*n*). So, where a bill was filed in chancery for an antique horn, with an ancient inscription, on the ground that it had immemorially gone with the plaintiff's estate, and been delivered to his ancestors by which to hold the land, the court was of opinion, that if the land were of the tenure called cornage, the heir had a title to this monument of antiquity at law (*o*). So, if land be sold by A. on condition, that if the purchase money be not paid by a limited day,

(*e*) 11 Vin. Abr. 169. 3 Bac. Abr. 61.
Holt v. Bishop of Winchester, 3 Lev.
47. 3 Salk. 280. S. C.

(*f*) 11 Vin. Abr. 145. Fitz. N. B.
33.

(*g*) 11 Vin. Abr. 173. Br. Chattels,
pl. 6.

(*h*) 11 Vin. Abr. 173. Br. Chattels,
pl. 20.

(*i*) Com. Dig. Biens, A. 2. Off. Ex.
60. 3 Bac. Abr. 64.

(*k*) Vid. *supr.* 144.

(*l*) 11 Vin. Abr. 175. Off. Ex. 54.

(*m*) Oxenden v. Lord Compton, 2
Ves. jun. 69. 75. note b. 4 Bro. Ch.
Rep. 231, 397. S. C. vid. ex parte
Marchioness of Annandale, Ambl. 81.

(*n*) Off. Ex. 63. 3 Bac. Abr. 65. L.
of Test. 381. Vid. Atkinson admx. v.
Baker, 4 Term Rep. 229.

(*o*) Bac. Abr. 65. Pusey v. Pusey,
1 Vern. 273. Harg. Co. Litt. 107.

then that he shall re-enter ; and A. die ; here, although there be [192] a debt due to the executor, and no land descended to the heir of A. yet the heir shall have the deeds, inasmuch as upon him the condition descended (*p*). But if A. deliver a charter to B. to redeliver to him, and his heirs, having no title to the land, his executor, and not his heir, shall have this charter, because it was only a chattel without the land (*q*).

So, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representative, as the party entitled to the benefit accruing from the loan (*r*).

SECT. II.

Of chattels personal which go to the heir : and herein of heir-looms.

WITH respect to chattels personal, and animate, the heir has a qualified possessory property in deer in a park, hares or rabbits in a warren, doves in a dove-house, pheasants and partridges in a [193] mew, swans, though unmarked, in a private moat or pond, or kept in water within a manor, or at large, if marked, and in bees in a hive, or as it has been held by some authorities, though not in a hive, *ratione soli*, in respect of his ownership in the soil. He is, also, entitled to fish in a private pond or piscary. These various animals shall all go with the inheritance, for without them it is incomplete (*a*). And such, we may remember, is the property that shall vest in the executor, if the testator had a lease for years in the land (*b*).

With regard to chattels personal, and vegetable, not only timber trees, as oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and horn-beam, but also trees of every other description belonging to the soil, and unless severed during the life of the ancestors, are the property of the heir (*c*). So, likewise, are all species of fruits, if hanging on the tree at the time of his ancestor's death. Grass, also growing, though ready to be mown for hay, shall descend with the land to the heir; for these are either natural, or permanent profits of the earth (*d*). He is also entitled to such hedges and bushes as are standing at that time (*e*).

(*p*) Off. Ex. 63.

(*q*) 11 Vin. Abr. 145. Fitzh. Dctineuc. pl. 7.

(*r*) 3 Bac. Abr. 65. Nov. Max. 50.

(*a*) Harg. Co. Litt. 8. Com. Dig. Biens. B. 1 Roll. Abr. 916. Off. Ex. 53. 11 Vin. Abr. 166. 2 Burn. Just. 369. 7 Co. 15 b. 3 Bac. Abr. 64. 2

Bl. Com. 427.

(*b*) Harg. Co. Litt. 8. note 10. Vid. supr. 141, 148.

(*c*) Com. Dig. Biens, H. 3 Bac. Abr. 64. Off. Ex. 59. Swinb. 934, 935. p. 7. s. 10.

(*d*) Swinb. 934, 935. p. 7. s. 10.

(*e*) Off. Ex. 59. 3 Bac. Abr. 64.

[194] But, as I have already stated (*f*), corn, which is raised by yearly cultivation, shall go to the executor, to compensate for the expence and labour of tilling, manuring, and sowing the lands, and for the encouragement of husbandry, which is of so public a concern (*g*).

The same law, on a similar principle, extends to other emblements, as hops, saffron, hemp, and the like (*h*).

It has been asserted by a learned writer (*i*), that roots of all kinds, such as parsnips, carrots, turnips, and skirrets, shall go to the heir, since they cannot be taken without digging and breaking the earth, which must of necessity be a detriment to the inheritance. It seems, however, perfectly clear, that these articles, as requiring an annual cultivation, fall within the like reasoning, which the law has adopted in regard to corn, and consequently shall belong to the executor (*k*).

But things which produce no annual profit are not comprehended under the name of emblements; therefore, although the testator himself hath sown the land with acorns, or planted it with oaks, [195] alders, elms, or other trees, they shall not be classed as emblements, but shall belong to the heir (*l*). So if the testator improved the natural produce, either by trenching, or by sowing hay-seed, such increase shall go to the heir; for the executors have no property in the natural produce, and in such instances that which was artificial cannot be distinguished from it (*m*). Wall fruit also, though greatly improved by culture, seems to fall within the same principle and to be the property of the heir. But the executor, we have seen, is entitled to hops, though growing on ancient roots, for they are produced by manurance and industry (*n*).

Although timber trees originally belong to the soil, yet, if A. seised in fee, sell the timber trees on his land to B. and B. died before they are felled, they shall belong to his executor (*o*). So, if a man sell his land, reserving the timber trees, they remain in him by particular contract, as chattels distinct from the soil, and shall go to his executor. For, in both these cases, in construction of law, they are abstracted from the earth, although they are not actually severed by the axe (*p*).

But, if a tenant in tail sell the timber trees on his soil, such sale will not be effectual without docking the intail, unless they were actually felled in the lifetime of such tenant, otherwise they will [196] descend with the land to the issue (*q*). So, if A. lease lands for life, or years, excepting the trees, they continue parcel of the

(*f*) Supr. 150.

(*g*) Off. Ex. 59. 3 Bac. Abr. 64.

(*h*) Ibid.

(*i*) Off. Ex. 62, 63. Vid. also Gilb. 1. of Ev. 249.

(*k*) Harg. Co. Litt. 55 b. 2 Bl. Com. 123.

(*l*) 2 Bl. Com. 123. Com. Dig. Biens. G. 1 Harg. Co. Litt. 55 b.

(*m*) Com. Dig. Biens. G. 1 Gilb. L. of Ev. 249. Harg. Co. Litt. 56.

(*n*) Harg. Co. Litt. 55 b. Cro. Car. 515. Vid. supr. 150.

(*o*) 3 Bac. Abr. 64. Off. Ex. 59, 60.

(*p*) 3 Bac. Abr. 64. Off. Ex. 60.

(*q*) Ibid. Stukeley v. Butler, Hob. 173. 11 Co. 50.

inheritance, so long as they are annexed to the land, and descend with it to the heir. So if a feoffment be made excepting the trees, and the feoffee afterwards buy them, they are re-annexed to, and become part of the inheritance (*r*). So, where a lessee for years purchased trees growing on land, and had liberty to cut them within eighty years, and he afterwards bought the inheritance of the land and died; it was held that the executor should not have the trees, for although they were once chattels, yet by the purchase of the inheritance they were re-united to the land (*s*).

Such personal chattels inanimate, as go to the heir with the inheritance, and not to the executor, are, for the most part, denominated heir-looms. The termination loom, in the Saxon language, signifies a limb, or member; consequently heir-looms denote limbs or members of the inheritance. They are such things as cannot be taken away without damaging, or dismembering the freehold. Whatever, therefore, is strongly affixed to the inheritance, and cannot be severed from it without violence or damage, *quod ab* [197] *ædibus non facîle revellitur*, is a member of the same, and shall pass to the heir, as chimney-pieces, pumps, tables, and benches which have been long fixed (*t*). The law is the same in regard to coppers, leads, pales, posts, rails, window-shutters, windows, whether of glass or otherwise, wainscots, doors, locks, keys, mill-stones fixed to a mill, anvils, and the like. They are annexed to the freehold, and are held to form part of it (*u*).

Although pictures and looking glasses generally go to the executor, as personal chattels, yet it has been held, that if they are put up instead of wainscot, they shall belong to the heir. He has a right to the house entire and undefaced (*x*).

But at so remote a period as that of Henry the Seventh, it was adjudged, that if the lessee annex any chattel to the house for the purposes of his trade, he may disunite it during the continuance of his interest, if he can do so without prejudice to the freehold. And therefore, that if such lessee be a dyer, and erect a furnace in the middle of the floor not affixed to any wall, he, and by consequence his executor, may take it down during the term, if it can be removed without injury to the inheritance; that while the term [198] continues, he is the owner both of the floor and of the furnace, but that if it be not severed while his interest subsists, it goes to the lessor of his heirs, inasmuch as the lessee is not master of both the subjects of alteration (*y*).

In modern times the doctrine of annexation has, on principles of public policy, been gradually relaxing; therefore, if things of this

(*r*) Com. Dig. Biens. H. 11 Co. 50. Swinb. p. 6. s. 7.
 4 Co. 63 b. (*x*) L. of Test. 380, 381. Cave v.
 (*s*) 11 Vin. Abr. 168. Ow. 49. Cave, 2 Vern. 508.
 (*t*) 2 Bl. Com. 427, 428. Ld. Petre
 v. Henegge, 12 Mod. 520. (*y*) 3 Bac. Abr. 63. Keilw. 88. Ow.
 70, 71. Off. Ex. 60, 61. Ex parte
 (*u*) 4 Burn. Eccl. L. 256. 3 Bac. Quincy, 1 Atk. 477. Poole's case,
 Abr. 63. Off. Ex. 62. 4 Co. 63, 64. Salk. 368. L. of Test. 380.

species can be removed without injury to the fabric of the house, or the soil of the freehold, they shall in general, be the property of the executor (*z*). Thus, modern tables, although fastened to the floor, grates, irons, ovens, jacks, clock-cases, in whatever mode annexed to the freehold, have by more recent cases been held to belong to the executor (*a*). So also have hangings, tapestry, beds fastened to the ceiling, and iron backs to chimneys (*b*). So, likewise in favour of trade, brewing vessels, vats for dyers, and soap-boilers' coppers. (1) So also furnaces, though fixed to the freehold, and purchased with the house (*c*). It has also been ruled, that a cyder mill (2) erected on the land shall go to the executor, and not to the heir. And in a case where the litigating parties were the executor of the tenant for life, and the remainder-man, the Lord [199] Chancellor seemed to be of opinion that a fire-engine set up for the benefit of a colliery, as between heir and executor, might in some instances be considered as personal property (*d*). Such latitude encourages improvements, and is beneficial to trade. But if the subject be not capable of removal without injury to the freehold; as, if a furnace is so affixed to the wall of a house as to be essential to its support, it shall not be taken away by the executor (*e*).

The ancient jewels of the Crown are also held to be heir-looms, for they are necessary to maintain the state, and to support the dignity of the existing sovereign (*f*).

So, also the collar of S. S. is an heir-loom, and shall go to the heir (*g*).

There are also other personal chattels, which descend to the heir in the nature of heir-looms; as ancient portraits of former owners of the mansion, though not fastened to the walls, a monument or tombstone in a church, or the coat of armour of his ancestor there hung up, with the pennons and other ensigns of honour suited to

(*z*) 3 Bac. Abr. 63. in note. Lord Vin. Abr. 167, 172. Squier v. Mayer, Dudley v. Lord Warde, Amb. 113. 2 Freem. 249. Harg. Co. Litt. 53. note 5. Harvey v. Harvey. 2 Str. 1141.

(*a*) 4 Burn. Eccl. L. 257.

(*b*) 4 Burn. Eccl. L. 256. 259. L. of Lawton, 3 Atk. 15. See also Elwes

Ni. Pr. 34. Harvey v. Harvey, 2 Str. v. Maw, 3 East T. Rep. 38.

1141. Ex parte Quincy, 1 Atk. 477. 256. 11 Vin. Abr. 166.

Beck v. Rebow, 1 P. Wms. 94. (*f*) 2 Bl. Com. 428. Harg. Co. Litt. 18 b.

(*c*) Poole's case, Salk. 368. L. of Ni. 18 b. (*g*) 11 Vin. Abr. 167. Ow. 124.

(1) *Gale v. Ward*, 14 Mass. Rep. 352. But as between mortgagor and mortgagee who has taken possession, a kettle in a fulling mill used for dying cloth, being set in brick work, passed to the mortgagee. *Union Bank v. Emerson*, 15 Mass. Rep. 159.

(2) *Holmes v. Tremper*, 20 Johns. Rep. 29. See *Hermance v. Vernoy*, 6 Johns. Rep. 5, and *Bradley v. Overhoudt*, 13 Johns. Rep. 404, where the question was between the vendor and vendee of land.

his degree (*h*). And the court will order an inspection of articles claimed by the plaintiff as heir-looms, in a chest at the bankers of the defendant, who insists by his answer that he has a lien on the contents of the chest (*i*). Pews also in a church may immemorially [200] descend from the ancestor to the heir, as appurtenant to his house (*k*).

By the special custom of some places, carriages, and also various articles of household furniture and implements may be heir-looms. But such custom must be strictly proved (*l*).

On the other hand, a granary built on pillars in Hampshire is by custom a chattel, and belongs to the executor (*m*).

The heir is likewise entitled to other personal chattels, inanimate, to which this appellation of heir-looms does not belong. An annuity, although only a chattel interest, is, as we have seen (*n*), descendible to the heir (*o*). So, a grant from the crown of one thousand pounds *per annum* out of the four and a half *per cent.* Barbadoes duty, with collateral security out of other revenue, although a mere personal chattel, having no relation to lands or tenements, nor partaking of the nature of a rent, was adjudged to the heir (*p*). But such an annuity is personal property, and will pass under a will attested by two witnesses, by a residuary clause, bequeathing all the rest, residue and remainder of the personal estate to the executor (*q*). So where A. on his marriage settled land on himself and his wife, and the issue of the marriage, with remainder over, and assigned to trustees bankers assignments established by act of parliament, and made a perpetual annuity redeemable by parliament, and directed to go as personal estate, and limited the profits thereof to the same person as by the settlement would be entitled to the land, and if the annuities should be redeemed by parliament, the money should be invested in the land, to be settled to the same uses, and A. died; it was decreed that these annuities being thus redeemable were to be considered as money directed to be laid out in lands, and to be as real estate, which after the wife's death should go to the settler's heir (*r*). On the other hand, a perpetual annuity of 4,000*l.* issuing out of the revenue of the post-office, but redeemable upon payment of 100,000*l.* when the state of affairs would permit, which sum, when paid, was to be laid out in the purchase of lands to be settled in manner there mentioned, was not considered as money to be laid out in land, but merely as a perpetual annuity, inasmuch as there was no certainty of the redemption (*s*).

- (*h*) 2 Bl. Com. 429. Harg. Co. Litt. 18 b. Abr. 146, pl. 25. Dr. & Stud. 90.
 (*i*) Earl of Macclesfield v. Davis, 5 Ves. & Bea. 16. (*p*) Com. Dig. Biens, A. 2. Earl of Stafford v. Buckley, 2 Ves. 170.
 (*k*) 2 Bl. Com. 529. 12 Co. 105. (*q*) Aubin v. Daly, 4 Barn. & Ald. 59.
 (*l*) Ibid. 428. Harg. Co. Litt. 18 b. (*r*) Disher v. Disher, 1 P. Wms. 204.
 (*m*) 11 Vin. Abr. 154. (*s*) Countess of Holderness v. Marquis of Carmarthen, 1 Bro. C. Rep. 377. and 1 P. Wms. 206, in note. S. C.
 (*n*) Vid. supr. 178.
 (*o*) Vin. Abr. 153. Argdo. Roper v. Radcliff, 10 Meol. 237. vid. also 11 Vin.

Where a copyhold tenement was burnt down, and money collected on briefs for rebuilding it was lodged in the hands of a guar-
[201] dian of the tenant in tail, who died under age; it was held that the money should go to his heir, both because of the intail, and because it was copyhold; but that allowance should be made to his personal representative for the amount of the interest of the money from the time it was so lodged to the death of the infant (*t*).

If A. recover land and damages, or a deed relative to land and damages, and die before execution, his heir shall have execution for the land or deed, and the executor for the damages (*u*).

SECT. III.

Of chattels which go in succession.

CHATTELS given to a corporation aggregate, as the dean and chapter of a cathedral church, the mayor and commonalty of a city, the head and fellows of a college, shall go in succession; but in case of a sole corporation, whether created by charter or prescription, as a bishop, parson, vicar, master of a hospital, and the like, chattels real and personal in possession, and in action, belong to their
[202] respective executors. Such property shall no more go to their successors than it shall go to an heir; for succession in a body politic is inheritance in case of a private person (*a*). So, if the chattel be granted to such sole corporation and his successors: As, if a term for years be granted to a bishop and his successors, his executors shall have it (*b*). So if an obligation or other specialty be executed to him and his successors, he can take it only as a private individual, and not in his corporate capacity (*c*).

But by custom a corporation sole may take goods and chattels in succession, as in London, where the chamberlain is a special corporation for taking bonds for orphanage money. And such custom has been frequently adjudged good (*d*). Also in some instances, particularly of chattels in action, the law is the same without a custom (*e*). As if the president of the college of physicians recover in debt against a party for practising without a licence, his successor, and not his executor, shall have a *scire facias* on the judgment, for the debt was recovered as due to him and the college (*f*).

(*t*) Com. Dig. Biens, B. Rook v. Warth, 1 Ves. 460.

(*u*) 11 Vin. Abr. 145. 169. Beamond v. Long, Cro. Car. 227. Off. Ex. 93. Com. Dig. Execution, E. 1 Roll. Abr. 389.

(*a*) Com. Dig. Biens, C. Franchises F. 16. 4 Co. 65. Harg. Co. Litt. 9 a

(*b*) 1 Roll. Abr. 515.

(*c*) 4 Co. 65. Dy. 43 a. 2 Bl. Com. 430, 431.

(*d*) Harg. Co. Litt. 9 a. note 1. 4 Co. 64 b. Wilford, Chamberlain of London, Cro. Eliz. 464. 682.

(*e*) Harg. Co. Litt. 9 a. note 1. Vin. Abr. tit. Corporation, L.

(*f*) 1 Roll. Abr. 515.

So, if the master of an hospital recover in that character the ar-
[203] rears of an annuity due to the hospital, and die, they go to his
successor, and not to his executor (*g*).

SECT. IV.

*Of chattels which go to a devisee or remainder-man: and herein
of emblements, and heir-looms.*

A DEVISEE of the lands is entitled to all those chattel interests which have been stated to belong to the heir (*a*); and in one respect he has an advantage to which the heir is not entitled. Such devisee, and not the executor of the devisor, shall have the emblements. Thus it has been held, that if A., seised in fee of land, sow, and devise it to B. for life, remainder to C. in fee, and die before severance, B. shall have the emblements, and not the executor of A.: Or that if B. die before severance, his executor shall not have them, but they shall go to him in remainder: Or that if the devise be only to B., and B. die before severance, there his executor shall have them, although B. did not sow. These points were so adjudged on the principle, that the devisee, in relation to the chattels belonging to the lands, stands in the place of the executor by the express terms of the will (*b*). This distinction, how-
[204] ever, seems not very reasonable (*c*): It appears strange, that the corn should pass to the devisee as appurtenant to the soil, and yet shall not descend to the heir. But a devisee of the goods, stock, and moveables is, it seems, entitled to growing corn in preference both to the devisee of the land and the executor (*d*).

In respect of the rights of the executor of tenant for life, as opposed to those of the remainder-man, it is a general rule, that where a party hath an uncertain interest in land, and his estate determines, yet he hath a title to the corn that is sown, and the other emblements on the land, though the property of the soil be altered (*e*). (1) With the view of giving all possible encouragement to agriculture, the law has created a property in the emblements distinct and separate from that of the soil, and has provided that such property shall be at the entire disposal of the owner, that he may not decline cultivation, lest the harvest should be reaped by a stranger. Moreover, the tenant who has sown has acquired a

(*g*) 1 Roll. Abr. 515.

(*a*) 2 Bl. Com. 428.

(*b*) Winch. 51. Gilb. L. of Ev. 218.

Vid. Grantham v. Hawley, Hob. 132.

(*c*) Harg. Co. Litt. 55 b. note 2.

(*d*) Winch. 51. Cox v. Godsalve,

Holt's MSS. 157. L. of N. Pri. 34.

Swinb. 933, 934. p. 7, s. 10.

(*e*) Gilb. L. of Ev. 240.

(1) So if tenant for life make a lease for years, and die before the expiration of the term, the under tenant, or tenant for years, if he has sown the lands, is entitled to the crop. *Bevans v. Bristol*, 4 Harr. & Johns. 139.

property in the corn by his expence and labour. It was his own in its original state, and before it was committed to the earth; and his property shall not be divested by its being sown on his own ground, and the less, on account of the skill and industry he has employed in raising it (*f*).

[205] On these principles the doctrine of emblements in respect to the executor of tenant for life is founded. Therefore, if such tenant sow the land, and die before severance, inasmuch as his estate was uncertain, and determined by the act of God, his executor shall have the corn, and he may take it from off the ground of the remainder-man (*g*). So it has been held, that at common law, on the death of tenant in dower, her executor was entitled to the corn; and that the statute of Merton (*h*), which gives her the power of devising it, was passed only in affirmance of the common law (*i*).

If A. seised in fee of land sow, and then convey it to B., and die before severance, the corn shall belong to B., and not to the executors of A.; on the principle, that every man's donation is to be taken most strongly against him; and therefore, it shall pass not only the land itself, but also the chattels which are incidental to it (*k*). If A. seised in fee of land sow, and then convey it to B. for life, with remainder to C. for life, and B. die before the corn is reaped; C. shall have it, and not the executors of B., for B. had no property in the corn arising from his own charge and industry, but merely by A.'s donation of the land, to which the corn is appurtenant; and by force of the same donation, by which B. had a [206] right to the corn, C. is entitled to it after the death of B. (*l*).

If A. seised in fee sow land, and give it to B. for life, remainder to C. for life, and they both die before severance, it shall go to A.; for when the force of the donation is spent the property shall result to the donor (*m*). If a disseisor of tenant for life sow the land, and such tenant die before severance, his executor, and neither the disseisor nor the reversioner shall have the corn (*n*). But trees shall not be regarded in favour of the executor of the tenant for life, any more than of any other executor, as emblements, or as distinct from the soil; for they are parcel of the inheritance, and are planted for the benefit of future generations (*o*). Therefore, if such tenant plant oaks, or other timber trees, or trees not timber, or hedges, or bushes, they shall not go to his executor, but to him in remainder (*p*). If, as we have seen, the tenant in fee make a lease excepting the trees, and afterwards grant

(*f*) Id. 241.

(*g*) Gilb. L. of Ev. 242. Harg. Co. Litt. 55 b. 5 Co. 116. Roll. Abr. 726. 727.

(*h*) 20 H. 3. c. 2.

(*i*) Gilb. L. of Ev. 245. Harg. Co. Litt. 55 b.

(*k*) Gilb. L. of Ev. 247.

(*l*) Gilb. L. of Ev. 247. Grantham

v. Hawley, Hob. 132. Roll. Abr. 727.

(*m*) Gilb. L. of Ev. 248. Grantham v. Hawley, Hob. 132.

(*n*) 2 Bac. Abr. 64. Goulds. 143.

(*o*) Gilb. L. of Ev. 242. 2 Bl. Com. 123. Co. Litt. 55 b.

(*p*) Gilb. L. of Ev. 249. Com. Dig. Biens, G. 1. H. Harg. Co. Litt. 55 b. Lat. 270.

the trees to the lessee, they are not re-annexed to the inheritance, but the lessee has an absolute property in them, and they shall go to his executor (*q*).

But if tenant by the curtesy, or in dower, or after possibility [207] of issue extinct, cut down trees, they shall not go to the executor, but to the remainder-man, or reversioner (*r*). So if A. tenant for life, with remainder to B. for life, cut down trees, they shall belong to him in reversion (*s*).

Yet, if there be a lessee for life, or years, without impeachment of waste, he has such an interest and property in timber trees, that, in case they are cut down in his lifetime, or during the term, they shall belong to his executor (*t*).

If the trees are thrown down by tempest in the lifetime of such lessee, or during the term, they shall go to his executor, and vest equally as if they had been severed by the act of the party (*u*). (1) But a lessee, though without impeachment of waste, has not an absolute property in the trees; for if they are not cut down in his lifetime, or during the term, his executor shall not have them, but they shall go to the lessor, as annexed to the freehold (*w*). So, if A., tenant for life, without impeachment of waste, with power to cut trees, and to make leases for three lives, lease for three lives, excepting the trees, and die before they are cut, the trees are re-annexed, and shall not be severed by his executor (*x*).

[208] A tenant *pur auter vie* is considered by the law, in regard to emblements, in the same light as a tenant for his own life: and therefore if a man be tenant for the life of another, and the *cestui que vie* die after the corn be sown, the tenant *pur auter vie*, and in case of his death, his executor shall have the emblements (*y*).

The advantages of emblements are also extended to the parochial clergy by the stat. 28 H. 8. c. 11. (*z*).

The lessees of tenants for life at common law, on the death of the lessors, exercised the unreasonable privilege of quitting the premises, and paying rent to nobody for the occupation of the land subsequent to the last quarter-day, or other day assigned for the payment of rent. For the representative of the tenant for life could maintain no action for the use and occupation, much less in case there were a lease; nor had the remainder-man such a right because the rent had not accrued due in his time (*a*). Nor could equity relieve by apportioning it (*b*). To remedy which

(*q*) Com. Dig. Biens, H. 4 Co. 63 b.

(*y*) 2 Bl. Com. 123.

(*r*) Com. Dig. Biens, H. 4 Co. 63.
11 Co. 82.

(*z*) 2 Bl. Com. 123. vid. 1 Roll. Abr. 655.

(*s*) Com. Dig. Biens, H. Al. 81.

(*a*) 2 Bl. Com. 124. 1 Fonbl. 2d

(*t*) Com. Dig. Biens, H. Harg. Co. Litt. 220. Moore, 327. 11 Co. 82 b.

edit. 384. Jenner v. Morgan, 1 P. Wms. 392. Paget v. Gee, Ambl. 199.

(*u*) 11 Co. 84. 1 Roll. Rep. 183.

(*b*) Jenner v. Morgan, 1 P. Wms.

(*w*) 1 Roll. Rep. 182. Lat. 270.

392. Hay v. Palmer, 2 P. Wms. 502. sed vid. Anon. Bunb. 294.

(*x*) Lat. 163.

hardship it is now enacted by stat. 11 *Geo. 2. c. 19. s. 15.* (1) that the executors of tenant for life, on whose death any lease determined, shall, in an action on the case, recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

The provisions of this statute have, by an equitable construction, been extended also to the case of tenants in tail, where leases are determined by their deaths (c).

Equity, however, will not in general apportion dividends of stock (d); but where the money is laid out in a mortgage till a purchase can be made, the interest is capable of being apportioned (e). and the distinction seems to turn on this point, that the interest on a mortgage is in fact due from day to day, and, therefore, not properly an apportionment; whereas the dividends accruing from the public funds are made payable on certain days, and, consequently, cannot be apportioned (f). On the principle of this distinction, dividends of money directed to be laid out in land, and in the mean time to be invested in government securities, and the interest and dividends to be applied as the rents and profits would in case it were laid out in land, were held not to be apportionable, [210] though the tenant for life died in the middle of the half year (g). And the decision was the same, where the money had been originally secured by mortgage, but by order of the court had been transferred on government securities (h).

But where, by a marriage settlement, maintenance for daughters was made payable half-yearly at Lady-day and Michaelmas, and to continue until their portions should become payable, namely, at their age of eighteen, or marriage, the portions and maintenance to be raised out of the rents and profits of the estate, or by sale, mortgage, or lease of the premises, and one of the daughters attained the age of eighteen on the 16th of August, she was decreed to have maintenance *pro rata* from the last Lady-day to the time of her attaining that age. On the ground that the general intention of the settlement was clear, that maintenance should be paid during the whole interval of time from the commencement of the term till the portion should become due, that is to say, half-yearly on the days above specified in every instance where it could happen, and where that could not be, it was a case not directly provided for by the settlement as to the time of payment, but within

(c) *Paget v. Gee*, Ambl. 198. *Vernon v. Vernon*, 2 Bro. Ch. Rep. 659.

(d) *Rashleigh v. Master*, 3 Bro. Ch. Rep. 99.

(e) *Edwards v. Countess of Warwick*, 2 P. Wms. 176.

(f) 1 Fonbl. 2d edit. 385. *Hay v.*

Palmer, 2 P. Wms. 501. and 503. note 1.

(g) Com. Dig. Chancery (4. N. 5.)

Sherrard v. Sherrard, 3 Atk. 502. *Wilson v. Harman*, Ambl. 279. S. C. 2 Vez.

672. sed vid. 3 Vin. Abr. 18. pl. 3.

(h) *Pearly v. Smith*, 3 Atk. 260.

(1) The 14th and 15th sections of this statute are in force in *Pennsylvania*. 3 Binn. 626. *Roberts' Dig.* 236. See *Berans v. Biscoe*, 4 Harr. & Johns. 140.

the general provision of the maintenance itself, which was expressed to continue till the portions should become payable (*i*).

And even dividends of money in the funds directed to be applied to the maintenance of an infant, or secured by the husband as a separate provision for his wife, would perhaps be apportioned in equity; inasmuch as it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter (*k*). And on this principle an apportionment of an annuity, being for the separate maintenance of a feme covert, has been allowed at law (*l*). Yet if the quarterly payments were originally prospective payments by way of maintenance for the ensuing quarter, and not payable at the end of each quarter, in order to discharge the expences incurred in the three preceding months, that circumstance might make a difference (*m*).

If a lessee for life of a manor seize an estray, and die before the year and day are elapsed, it shall belong to his executor (*n*).

[211] In regard to heir-looms, I have already stated, that the strictness of the ancient rule has in later time been relaxed, as between the executor and the heir (*o*). But it has been still more so, as between the executors of tenant for life, or in tail, and the reversioner (*p*).

Hence it has been adjudged, that a fire-engine set up for the benefit of a colliery by tenant for life, or in tail, shall be considered as his personal estate, and shall go to his executor, and not to the remainder-man. And indeed reasons of public convenience operate more strongly as between such parties, than even as between heir and executor. A tenant for life would be discouraged from making improvements, if the benefits of them might devolve, not on his personal representatives, but on a remote remainder-man, perhaps the next day after the improvements were effected (*q*).

(*i*) Hay v. Palmer, 2 P. Wms. 501.

(*k*) Vid. 1 Fonbl. 2d edit. 386. and 2 Bl. Rep. 1017.

(*l*) Howell v. Hanforth, 2 Bl. Rep. 1016.

(*m*) Per De Grey C. J. 2 Bl. Rep. 1017.

(*n*) 11 Vin. Abr. 145. Moore, 11.

(*o*) Supr. 198.

(*p*) L. of Ni. Pri. 34.

(*q*) Lawton v. Lawton, 3 Atk. 13. Lord Dudley v. Lord Warde, Ambl.

CHAP. V.

OF THE CHATTELS WHICH GO TO THE WIDOW.

SECT. I.

Of the chattels real which go to the widow: and herein also, of such chattels real as belong to the surviving husband.

IN contemplation of law, a complete unity of person subsists between the husband and wife. As long as the relation continues, they are regarded as one individual. The very existence of the wife is suspended during the coverture, or entirely merged or incorporated in that of the husband. On this principle, whatever personal property belonged to her when sole, is vested in the husband by the marriage (*a*).

And, first, in regard to chattels real: Some are in the nature of a present vested interest, in others she has only an interest possible or contingent. Of the first class are leases for years, estates by statute-merchant, statute-staple, or elegit, or any other chattel real in her possession. The second class is distinguished into such [213] as are called possibilities, and such as are denominated contingent interests; as, if a term of years be devised to A. for life, and after A.'s death to B., B.'s interest in the residue of the term operates by way of executory devise, and is styled a possibility. But, if a real estate be limited to A. for life, and after the decease of A., and if B. die in A.'s lifetime, to C. for a term of years, this operates not as an executory devise, but as a remainder, and therefore is considered as a contingent interest (*b*).

In the chattels real of the wife, present and vested, an interest of the nature of the joint tenancy of the husband and wife is created by the marriage, and is a consequence of their legal unity, but subject to alienation by the husband in his lifetime (*c*); for example, in case of a lease for years, he shall, during the coverture, receive the rents and profits of it; but if he does nothing more, on his dying before his wife, it shall survive to her, and shall not go to his executor; but he may during the coverture alienate it, either directly or consequentially, by such acts as shall induce an alienation. He may sell, surrender, or dispose of it in his lifetime at his pleasure. On his attainder or outlawry, it shall be forfeited to the king, or it may be taken in execution for his debts (*d*).

(*a*) 2 Bl. Com. 433. Com. Dig. Baron & Feme, D. 1.

(*c*) Plowd. 418. 2 Bl. Com. 435.

(*d*) 2 Bl. Com. 434. Harg. Co Litt.

(*b*) Harg. Co. Litt. 351. note 1.

46 b. Plowd. 263.

He has also during coverture a right to assign such possible and [214] contingent interests as have been just mentioned, unless, perhaps, in those cases where the possibility or contingency is of such a nature that it cannot happen during his life. As where a lease is granted to the husband and wife for their lives, with remainder to the executors of the survivor (*e*). Or, unless, in equity at least, the future or executory interest in a term, or other chattel, were provided for the wife with the consent of the husband before marriage, for in that case his disposition of it would be a breach of his own agreement (*f*).

If the husband dispose not of the chattels real of the wife in his lifetime, and die before her, they shall not pass by his will, nor shall they go to his executor; for, not having altered the property in his lifetime, they were never transferred from the wife; but after his death, she shall remain in her ancient possession (*g*). (1)

But, if the husband grant the term, on condition that the grantee shall pay a sum of money to his executors, though the condition be broken, and the executors enter, this is a disposition of the term, and the wife is barred of it, for the whole interest was passed away (*h*).

[215] If the husband and wife be ejected of the term, and the husband bring an ejectment in his own name only, and recover, this also is an alteration of the term, and vests it in the husband (*i*); for his suing alone is expressive of his intention to divest the wife of her interest, and to treat the term as exclusively his own.

If he submit the term to the arbitration of A., who awards it to B., it will be a disposition by the husband against the wife (*k*). So, the husband may make a lease of the term to commence after his death, and it shall be good, although the wife survive (*l*); but he cannot charge such chattel real beyond the coverture; as, if he grant a rent-charge out of the term, and the wife survive, she shall avoid the charge, for by her survivorship she is remitted to the term, of which the coverture did not divest her (*m*).

Nor if there be judgment against him, can execution be sued out after his death against the term (*n*); nor shall it after his death be extended on a statute or recognizance acknowledged by him (*o*); nor, as it seems, for a debt due from him to the king (*p*). Nor,

(*e*) 10 Co. 51. Harg. Co. Litt. 46 b.
Com. Dig. Baron and Feme, E. 2.

(*f*) Harg. Co. Litt. 351. note 1.

(*g*) 2 Bl. Com. 434. Plowd. 418.

(*h*) Com. Dig. Baron and Feme, E.
2. Harg. Co. Litt. 46 b.

(*i*) 1 Roll. Rep. 359. Harg. Co.
Litt. 46 b. Sed vid. note 6. *ibid*.

(*k*) Dyer, 183.

(*l*) Grute v. Locroft, Cro. Eliz. 287.
Poph. 5.

(*m*) Harg. Co. Litt. 351. Plowd.
418.

(*n*) 1 Roll. 344. 346.

(*o*) 1 Roll. Abr. 346.

(*p*) 2 Roll. Abr. 157. 1 Roll. Abr.
346.

(1) A conveyance by a husband will pass the entire interest of his wife, entitled to a life estate in lands, in the event of his surviving; but if she survives him, it passes only an interest during his life. *Evans v. Kingsbury*, 2 Rand. Rep. 120.

[216] has his disposition of part of the term the effect of a disposition of the whole. As, if A. be possessed of a term for forty years in right of his wife, and grant a lease for twenty years, reserving a rent, and die; although the executors of the husband shall have the rent, for it was not incident to the reversion, inasmuch as the wife was not party to the lease, yet she shall have the residue of the term (*q*). If the term be extended, the wife shall have the term after the extent is satisfied (*r*). If the husband and wife mortgage the term, and the husband pay the money, and enter and die, the wife shall have it (*s*). If the wife and her husband were joint tenants of a rent-charge for their lives, the wife, in case she survive, shall have the arrears incurred during the coverture (*t*). If the husband and wife make a lease reserving rent, and she assent after the death of the husband, she shall have the arrears incurred in his lifetime (*u*). Or if the husband be entitled to an advowson in right of his wife, and after an avoidance, but before presentation die, his wife, and not his executors, shall present (*w*).

In case the wife die before the husband, all the chattels real of the wife, in which there exists a present, actual, and vested interest, become absolutely and entirely his own by survivorship (*x*), [217] and that without taking out administration to her (*y*). To entitle himself to her chattels real, which are not so vested, he must make himself her representative, by becoming her administrator. It seems formerly to have been doubted, whether, if, having survived his wife, he died during the suspense of the contingency on which any part of his wife's property depended, his representative, or his wife's next of kin, had a right to the benefit of it; but by a series of authorities it is now settled, that the husband's representative is beneficially entitled as well to this species of the wife's property (*z*), as to any other, which devolved to him either as survivor, or by virtue of the grant of administration. And although the husband's right to such grant be personal only, and not transmissible, and, as I have before stated (*a*), the spiritual court be in such case obliged by the stat. 31 *E.* 3. to commit administration to the next of kin of the wife, yet such grantee is regarded in equity as a mere trustee for the representative of the husband (*b*).

If the tenant in dower grant a lease for years, and marry, and die, the husband shall have the rent in arrear in his wife's lifetime (*c*). And by the stat. 32 *Hen. 8. c. 37.* arrears of rent due as well before as after coverture to the wife seised in fee, in tail,

(*q*) Harg. Co. Litt. 46 b.

(*r*) 1 Roll. Abr. 344.

(*s*) Ibid.

(*t*) 1 Roll. Abr. 350. *Dembyn v. Brown, Moore, 887.*

(*u*) Ibid. 350.

(*w*) Com. Dig. Baron and Feme, E. 3. Co. Litt. 351.

(*x*) Co. Litt. 300. Com. Dig. Baron

and Feme, E. 2.

(*y*) Com. Dig. Baron and Feme, E. 2 Roll. Abr. 345.

(*z*) Harg. Co. Litt. 351. note 1.

(*a*) Supr. 116.

(*b*) Sed vid. Harg. Co. Litt. 351. note 1. 1 Harg. Law Tr. 475. in note.

(*c*) Moore, 7.

or for life, are on her death given to the husband. If the husband [218] be entitled to an advowson in right of his wife, and he survive, he shall have an avoidance which happened during the coverture (*d*). If a wife were possessed at her marriage of a trust term to her separate use, the surviving husband shall be entitled to it, except in special cases (*e*); as if, before marriage, it were settled on her with the assent of the husband (*f*). If the husband and wife mortgage a term of the wife, and the husband survive, he shall have the equity of redemption (*g*).

If the husband sow the land of which he is seised in right of his wife, and she die, he shall have the profits (*h*). Or if he die before the wife and before severance, his executors shall be entitled to them; but it seems, that in the event of his so dying, if the lands were sown before the marriage, the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground belongs to the freehold, and is not transferred to the husband; and, therefore, as it was undisposed of in his lifetime, it devolves to the wife (*i*). So, if A. seised in fee sow copyhold lands and surrender them to the use of his wife, and die before severance, it seems that the wife shall have the corn, and not the executors [219] of the husband; for this is a disposition of the corn as appurtenant to the land, and since the husband disposed of it during his life, it cannot belong to his executors (*k*). But, if the husband and wife be joint tenants, and the husband sow the land, and die, it seems the corn shall go to the executor of the husband, for the land is not cultivated by a joint stock, the corn is altogether the property of the husband, and it shall not be lost by being committed to their joint possession, any more than if it had been sown in the land of the wife only (*l*).

SECT. II.

Of the chattels personal which go to the widow: and herein, of such personal chattels of the wife as go to the surviving husband.

CHATTELS personal, or *choses* in action, as debts on bond, simple contracts, and the like, do not vest in the husband, until he re-

(*d*) Com. Dig. Baron and Feme, E. 3. Harg. Co. Litt. 351.

(*e*) Com. Dig. Baron and Feme, E. 2. 1 Fonbl. 98. Sir Edward Turner's case, 1 Vern. 7. Pitt v. Hunt, ib. 18. Tudor v. Samayne, 2 Vern. 270. Jewson v. Moulson, 2 Atk. 421. Sed vid. Countess Strathmore v. Bowes, 2 Bro. Chan. Rep. 345.

(*f*) Com. Dig. Chancery, 2 M. 9. Harg. Co. Litt. 351. note 1.

(*g*) Young v. Radford, Hob. 3.

(*h*) Gilb. L. of Ev. 245. Harg. Co. Litt. 55 b.

(*i*) Gilb. L. of Ev. 246. Harg. Co. Litt. 55 b. note 5. Roll. Abr. 727.

(*k*) Roll. Abr. 727.

(*l*) Gilb. L. of Ev. 245. Roll. Abr. 727. Sed vid. Harg. Co. Litt. 55 b. et not. 7. Vin. Abr. tit. Emblements, pl. 16. Com. Dig. Biens. G. 2. L. of Test. 380.

ceives, or recovers them at law. When he has thus reduced them into possession, they become absolutely his own, and at his death, [220] shall go to his representatives, or as he shall appoint by his will, and shall not revert in his wife (a). (1)

In respect to such *choses* in action as vested in the wife before her marriage, the husband must sue jointly with her to recover them (b). (2) As to such of the wife's *choses* in action, as accrued subsequent to the coverture, he may sue either in their joint names, or alone, at his pleasure (c). (3)

If he join her in action and recover judgment, and die, the judgment will survive to her on the principle, that although his bringing the action in his own name alone be a disagreement to the wife's interest, and indicate his intention that it shall not survive to her: yet if he bring an action in the joint names of himself and his wife, the judgment is, that they both shall recover,

(a) 2 Bl. Com. 434. Harg. Co. Litt. 351.

(b) Com. Dig. Baron and Feme, V. 1 Roll. Abr. 347. Ow. 82. Woodward v. Parry, Cro. Eliz. 537. Garforth v. Bradley, 2 Ves. 676. 1 Sid. 25.

(c) Blackburn v. Greaves, 2 Lev. 107. Howell v. Maine, 3 Lev. 403.

Al. 36. Cappin v. —, 2 P. Wms. 497. Vid. Mitehinson v. Hewson, 7 Term Rep. 349.

(1) *Lodge v. Hamilton*, 2 Serg. & Rawle, 493. And the same rule prevails where the husband and wife jointly during the coverture become entitled to a *chose in action*. *Ibid.* But in *Whitaker v. Whitaker*, 6 Johns. Rep. 112, it was decided, that a husband who survives his wife is entitled to all her *choses in action*, whether reduced into his possession in her lifetime or not. See also 5 Johns. Cha. Rep. 206. See, however, *Roper's Law of Husb. and Wife*, vol. i. p. 202. *Udall v. Kenney*, 3 Cow. Rep. 590. *Bohn v. Headley*, 7 Harr. & Johns. 257. *Hynes v. Lewis*, 1 Tayl. Rep. 44. 5 Day's Rep. 294. As to *reversionary* interests of the wife in personal property, she is entitled by survivorship to them against both the general and particular assignee of the husband, if he dies without having reduced them to possession. *Hornshy v. Lee*, 2 Madd. Rep. 16. *Purdew v. Jackson*, 1 Russ. Rep. 1. In the last case, which was most elaborately argued, and all the cases referred to, the Master of the Rolls (Sir T. Plumer) asked the counsel who argued in support of the claim of the assignee of the husband (Mr. Sugden and Mr. Shadwell) "if there was any case in which the husband having assigned the wife's present *chose in action*, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife;" to which they replied, "that they believed that such a case had not occurred." He further observed in giving judgment, "that the act of the husband cannot take away or abridge the wife's right, unless he reduces the *chose in action* into possession—it is in vain for him to stipulate, that, though he is unable or unwilling to reduce it into possession, and though after his death it should continue to be a *chose in action*, his surviving wife shall not be entitled to recover it for her own benefit." See also *McCallop v. Blount*, *Johnston v. Pasteur*, Cam. & Norw. 96, 464. *Byrne's Adm. v. Stewart*, *Ex parte Elms*, 3 Desauts. Rep. 135, 155. When the husband obtains possession of the wife's personal property, he is entitled absolutely to it; and, in the absence of any contract or assumption on his part, is not bound to pay her debts, contracted before marriage, with it, if the wife die before payment of them. *Beach v. Lee*, 2 Dall. Rep. 257.

(2) *Crozier v. Gano*, 1 Bibb's Rep. 257. And where a bond and warrant of attorney are given to a *feme dum sola*, who afterwards marries, the Court upon affidavit of the facts, will direct judgment to be entered in favour of the *baron and feme*. *Sheble v. Cummin*, 1 P. A. Browne's Rep. 253.

(3) *The State v. Krebs*, 6 Harr. & Johns. 31. *Banks v. Marksherry*, 3 Litt. Rep. 281. 2 Conn. Rep. 366. *Armstrong v. Simonton*, 2 Tayl. Rep. 266.

and therefore such action does not alter the property, nor imply an intention on his part to do so, and, consequently, the surviving wife, and not the representative of the husband, is entitled to a *scire facias* on the judgment (*d*). (1)

Indeed it has been asserted by a great authority, that, even in the case of the husband's suing alone for the wife's debt and his [221] dying before execution, his wife and not his executors, shall be thus entitled (*e*). (2)

Such chattels shall, *a fortiori*, survive to her, if the husband die before he has proceeded to reduce them into possession (*f*). Hence a portion due to an orphan in the hands of the chamberlain of London, unless it be recovered, or received by the husband, shall, on his death, go to his wife, and not to his executor, for it is clearly a *chose* in action (*g*). (3) So before the stat. 5 Geo. 2. c. 30. s. 26. where the debtor to the wife became bankrupt and the husband claimed the debt, and paid the contribution-money, and died before any dividend, his wife, and not his executor, was held entitled to the debt, for by such payment the property was not altered (*h*). So if an estray come into the wife's franchise, in case the husband die without seizing it, his wife and not his executors, are entitled to the seizure. In all these cases the husband's right is determined with the coverture (*i*).

But, if the husband grant a letter of attorney to A. to receive a debt or legacy due to the wife, and A. receive it, but before he pays it over the husband die, it shall be considered as having vest- [222] ed in his possession, and shall go to his executors (*k*). (4)

(*d*) Com. Dig. Baron and Feme, V. S. C. Ca. Ch. 182.
Harg. Co. Litt. 351. note 1.

(*h*) Com. Dig. Baron & Feme, E. 3.

(*e*) Bond v. Simmons, 3 Atk. 21.

Anon. 2 Vern. 707.

(*f*) 2 Bl. Com. 434. Harg. Co. Litt. 351.

(*i*) 2 Bl. Com. 434. Harg. Co. Litt. 351 b.

(*g*) Com. Dig. Baron & Feme, E. 3.
Pheasant v. Pheasant, 2 Ventr. 341.

(*k*) Roll. Abr. 342. Huntley v. Grif-
fiths, Moore, 452.

(1) And a note and mortgage made to husband and wife, shall go to the wife, if she survive her husband, and not to the executor of the husband. *Draper v. Jackson*, 16 Mass. Rep. 480. So also a recognizance taken in the Orphan's Court for the wife's share of land, in the name of the husband and wife, not reduced into possession, nor disposed of by the husband, survives, on his death, to the wife. *Lodge v. Hamilton*, 2 Serg. & Rawle, 491.

(2) See *Hammick v. Bronson*, 5 Day's Rep. 294 to 297.

(3) A share of personal estate accruing, in right of the wife, during coverture, vests, even before distribution made, in the husband, absolutely, and does not in the event of his prior death survive to her. *Griswold v. Penniman et ux.* 2 Conn. Rep. 564. And a husband may forfeit, by his conduct in abandoning and ill treating his wife, and marrying another woman and continuing to live with her for twenty years, all just claim to the wife's distributive share of personal estate inherited by her; and a court of equity will lay hold of the property, and provide for her maintenance out of it. *Dumond v. Magee*, 4 Johns. Cha. Rep. 318.

(4) *Schuyler v. Hoyle*, 5 Johns. Cha. Rep. 196. But if the husband and wife make a *joint* power to receive the debt or legacy due to the wife, and the attorney obtained possession of the property, but before he had paid over the entire share the husband died, the wife is entitled, in her own right, as survivor, to that portion not actually paid over to the husband. *Ibid.*

Such are the principles of law on this subject ; but in equity it is held, that a settlement before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in her lifetime to her *choses* in action. But it has been asserted, that if it be not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced by the husband. So, if it be in consideration of part of her fortune, such things in action as are not comprised in that part, it is said, survive to the wife. And in a case where a settlement was made to provide for the wife, without mentioning her personal estate, the Lord Keeper decreed, that such estate should belong to the representatives of the husband, and held, that in all cases where there is a settlement equivalent to the wife's portion, it shall be intended that the husband shall have the portion, although there be no agreement for that purpose (*l*). But the presumption of an agreement from the mere fact of a settlement being made by the husband, is peculiar to the case last cited, and has been disavowed by the court in several other cases (*m*).

Equity also considers money due on mortgage as a *chose* in action ; and it seems to have been formerly understood, that since the husband could not dispose of lands mortgaged to the wife in fee without her, and the estate remained in her, she or her representatives were entitled to the money, as incident to it ; but that in regard to a mortgage debt, secured by a term of years, as the [223] husband had an absolute power over the term, there was no obstacle to the debt's vesting in his representatives ; but this distinction is exploded, and it is now held, that although in case of a mortgage in fee, the legal fee of the lands in mortgage continue in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt (*n*).

If the husband and wife have a decree in equity, in right of the wife, and the husband die, the benefit of the decree belongs to the wife, and not to the executor of the husband (*o*). (1)

But if the wife's fortune be in the Court of Chancery, on the husband's death his representatives shall be entitled to it, subject

(*l*) Harg. Co. Litt. 351. note 1. 3 and Druce v. Denison, 6 Ves. jun. P. Wms. 200. note D. Prec. Chan. 385.

Cleland v. Cleland, 63. Packer v. (n) Harg. Co. Litt. 351. note 1. Bosvil v. Brander, 1 P. Wms. 458. Bates Hereford, 2 Vern. 502. Adams v. v. Dandy, 2 Atk. 207.

Cole, Ca. Temp. Talb. 168. (o) Harg. Co. Litt. 351. note 1. Nanney v. Martin, 1 Chan. Ca. 27. Carr v. Taylor, 10 Ves. jun. 579, See also Salwey v. Salwey, Amb. 692. 580.

(1) *Schuyler v. Hoyle*, 5 Johns. Cha. Rep. 210. So if the husband die pending a suit in equity in the name of the husband and wife for the recovery of personal property in right of the wife, the right survives to her, and on her death the suit should not be revived in the name of his administrators. *Taughan et ux. v. Wilson*, 4 Hen. & Munf. 452.

to the same equity as before, in favour of the wife. In case of her death it shall become the absolute property of the husband; and it has been held, even where the court detained the fund in order to enforce a provision for the wife, and made a decree for that purpose, and she survived her husband, yet, that on her death, his representatives were entitled to it, inasmuch as it had absolutely vested in him by law. In these cases, it seems to make no difference [224] once whether there be any issue of the marriage or not (*p*).

In case the husband survive the wife, her chattels real, as we have seen, shall become his absolute property (*q*). But her *choses* in action shall go to her representatives, excepting the arrears of rent due to her, which, as I have before stated, on her death are, by stat. 32 Hen. S. c. 37. given to the husband. The ground of the distinction is this: The husband is in absolute possession of the chattel real during coverture, by a kind of joint-tenancy with his wife, and therefore the law will not wrest it from him, though if he had died first it would have survived to the wife, unless he had altered the possession in his lifetime: but a *chose* in action was never in his possession: He could acquire it only by suing in his wife's right, and as after her death he cannot as husband bring an action in her right, because they are no longer one and the same person in law, therefore he can never as such recover the possession. But, in the capacity of her administrator, he may recover such things in action as became due to her before or during the coverture (*r*).

In chattels personal, or *choses* in possession of the wife in her own right, as ready money, jewels, household goods, and the like, the husband hath an immediate, absolute, and actual property devolved to him by the marriage, which never can revest in the wife or her representatives (*s*). (1)

[225] Such chattels also as are given to the wife after the marriage shall belong to the husband, and he shall be entitled to them, although they had not come to his possession at the time of her death (*t*). (2) Thus it hath been held, that if a legacy be left to a wife, to be paid twelve months after the testator's death, and the wife die within that period, her husband is entitled to it, for an immediate interest was vested in him, and subject to his release before the time of payment (*u*). (3)

Such are the legal consequences of the unity of husband and wife; but courts of equity, although they recognize the rule of

(*p*) 1 Fonbl. 8, 89. Packer v. Wyndham, Prec. Chan. 418. Perkins v. Thornton, Ambl. 503.

(*q*) Supr. 216.

(*r*) 2 Bl. Com. 435.

(*s*) 2 Bl. Com. 435. 3 Bac. Abr. 65.

Dr. & Stud. Dial. 1. cap. 7.

(*t*) Com. Dig. Baron & Feme, E. 3. Miles' Case, 1 Mod. 179. 1 Sid. 337.

(*u*) Com. Dig. Baron & Feme, E. 3. 2 Roll. Rep. 134.

(1) *Reeve's Dom. Relations*, 1.

(2) *Swann v. Guage*, 1 Hayw. 3.

(3) *Reeve's Dom. Relations*, 60. *Dade v. Alexander*, 1 Wash. Rep. 30.

law which considers the husband and wife as one person, yet, in some cases, will treat their interests as distinct (*u*). If property be given generally to the wife, it shall vest in the husband, both in law and equity; nor shall it be supposed to be for her separate use, though she live apart from the husband (*v*). (1) But where it is given to the separate use of the wife, she shall be entitled to it in equity independently of her husband (*w*). And though it were always clear that she was thus entitled to such property, if trustees were interposed, yet it was formerly a doubt, whether she could take it where none were appointed (*x*). It is now however settled in the affirmative. It has been held, that where A. devised lands in fee to his daughter, a feme covert, for her separate use, without naming trustees, it should be a trust in the husband, for it makes no difference whether the trust be created by the act of the party, or by the act of the law (*y*). So, where a bond was bequeathed to a wife for her sole and separate use, and no trustees nominated, it was held to be completely vested in her in equity (*z*). (2)

And equity will not only raise a trust where the gift is expressly for the separate use of the wife, but will infer it from words not technical, or from the circumstances under which the gift is made, or, as it seems, merely from the nature of the subject: Thus, where an estate was given to a husband, for the livelihood of his wife, he was considered as a trustee for her separate use (*a*). So where diamonds were given to the wife by the husband's father, on her marriage, it was held, that they were a gift to her separate use, and that she was in equity entitled to them in her own right (*b*). And, where a foreigner made the wife a present of trinkets, though [227] not expressly for her separate use; Lord Hardwicke, C. seemed to think they should be so construed (*c*).

Gifts, likewise, from the husband to the wife, although the law does not allow the property to pass, shall, without prejudice to creditors, be supported in equity, whether trustees be interposed, or not (*d*). Thus, where the husband transferred one thousand pounds South Sea Annuities in the name of his wife, she was held entitled to them, as given to her separate use (*e*).

(*u*) 1 Fonbl. 87. *Brooks v. Brooks*,
Prec. Chan. 24. *Moore v. Moore*, 1
Atk. 272.

(*v*) *Palmer v. Trevor*, 1 Vern. 261.
Harvey v. Harvey, 2 Vern. 659.

(*w*) *Griffith v. Hood*, 2 Ves. 452.

(*x*) 1 Fonbl. 98. *Harvey v. Harvey*,
1 P. Wms. 126. *Burton v. Pierepoint*,
2 P. Wms. 79.

(*y*) *Bennet v. Davis*, 2 P. Wms. 316.
Darley v. Darley, 3 Atk. 399. Com.

Dig. Baron & Feme, D. 1.

(*z*) *Rolfe v. Budder*, 1 Bunb. 187.

(*a*) *Darley v. Darley*, 3 Atk. 399.

(*b*) *Graham v. Londonderry*, 3 Atk.
393.

(*c*) 1 Fonbl. 98. *Graham v. London-*
derry, 3 Atk. 393.

(*d*) *Lucas v. Lucas*, 1 Atk. 270.

(*e*) *Ibid.* 271. *Graham v. London-*
derry, 3 Atk. 393.

(1) *Fitch v. Ayre*, 2 Conn. Rep. 143. *Barrett v. Barrett*, 4 Desaus. Cha.
Rep. 452. *Torbert v. Twining*, 1 Yeates, 432.

(2) *Jamison v. Brady*, 6 Serg. & Rawle, 466.

So trinkets given to the wife by the husband in his lifetime, were decided to be her separate estate (*f*). And where a husband allowed his wife to make profit of all butter, poultry, fruit, and other trivial matters arising from the farm, beyond what was used in the family, out of which she saved one hundred pounds, which the husband borrowed, on his death the Court of Chancery allowed the agreement, as a reasonable encouragement of the wife's frugality, and admitted her to come in as a creditor for that sum (*g*). (1). So where the husband agreed that the wife should take two guineas of every tenant beyond the fine paid to the husband for the renewal of a lease, this was allowed to be the wife's separate money (*h*). But, in all such cases, to entitle the wife to such an allowance, there must be a sufficient fund for the payment of debts (*i*). Nor will the court, in any case, permit a gift of the [228] whole of the husband's estate, while he is living, for that would not be in the nature of a mere provision, which is all she is entitled to (*k*).

But, if the husband and wife live together, and he provide her with clothes and other necessaries, and she demand not but suffer him to receive the rents and profits of her separate estate, or her pin-money, or if she accept payments short of what she is entitled to on his death, neither she nor her representatives shall have an account of such separate estate farther back than a year, for she shall be presumed to have waived her right to the antecedent produce (*l*). (2) Yet, under particular circumstances, it may be otherwise; as where the wife had three hundred pounds *per annum* pin-money, and the husband, for several years before his death, paid her only two hundred, but promised her that she should have the whole at last, she was held entitled to all the arrears (*m*).

In like manner shall she be entitled to all arrears, if she lived separate from her husband (*n*).

But, if A. proposing to give a married woman money for her separate use, and to secure it, give her a note for a certain sum, as received, promising to be accountable, it shall be assets in the

(*f*) *Graham v. Londonderry*, 3 Atk. 393.

(*g*) *Slanning v. Style*, 3 P. Wms. 339.

(*h*) *Ibid.* 1 Fonbl. 95.

(*i*) *Slanning v. Style*, 3 P. Wms. 339.

(*k*) *Beard v. Beard*, 3 Atk. 72.

(*l*) *Powell v. Hankey*, 2 P. Wms.

82. *Thomas v. Bennett*, ib. 340. *Fowler v. Fowler*, 3 P. Wms. 355. *Lord Townshend v. Windham*, 2 Vez. 7. *Peacock v. Monk*, ib. 190.

(*m*) *Ridout v. Lewis*, 1 Atk. 269.

See also 1 Eq. Ca. Abr. 140. pl. 7.

(*n*) 3 Atk. 695. 1 Vez. 298.

(1) So if by the laws of another state (*Louisiana*) the husband and wife can contract in relation to her separate property, and she lends him money, and takes his obligation for it, and he dies in *Pennsylvania*, the contract, according to the laws existing in such other state, may be enforced, at the suit of the wife surviving, against the husband's executors in the Courts of *Pennsylvania*. *Dougherty v. Snyder*, 15 Serg. & Rawle, 84.

(2) *Methodist Episc. Church v. Jaques*, 3 Johns. Cha. Rep. 77. *McGlinsey's Appeal*, 14 Serg. & Rawle, 64.

[229] hands of the executor of the husband. So, likewise, if a married woman deposit money in A.'s hands to be kept for her separate use, it shall be considered as part of the husband's estate (*o*).

SECT. III.

Of the wife's paraphernalia.

THE wife, also, may acquire a legal property in certain effects of the husband at his death, which shall survive to her over and above her jointure, or dower, and be transmissible to her personal representatives (*a*).

Such effects are styled paraphernalia; a term which, in law, imports her bed, and necessary apparel, and also such ornaments of her person as are agreeable to the rank and quality of the husband (*b*). Pearls and jewels, whether usually worn by the wife (*c*), or worn only on birth-days, or other public occasions (*d*), are also paraphernalia.

To what amount such claims shall prevail is a point which cannot admit of specific regulations. It must be left, on the particular [230] circumstances of the case, to the discretion of the court (*e*).

In the reign of Queen Elizabeth, jewels to the value of five hundred marks were allowed, in the case of the wife of a viscount (*f*). A diamond chain, of the value of three hundred and seventy pounds, where the lady was the daughter of an earl, and wife of the king's sergeant at law, in the reign of Charles the first, was considered as reasonable (*g*). Jewels and plate bought with the wife's pin-money, to the amount of five hundred pounds, which bore a small proportion to the husband's estate, were regarded in the same light (*h*). And Lord Hardwicke, C. held the widow of a private gentleman to be entitled to jewels worth three thousand pounds, as her paraphernalia, and that the value made no difference in the Court of Chancery (*i*). By the custom of London, a citizen's widow may retain some of her jewels as paraphernalia, but not all (*k*).

If the husband deliver cloth to the wife for her apparel, and die before it be made, she shall have the cloth, as of this species of property (*l*). If the husband present his wife with jewels, for the ex-

(*o*) *Hodges v. Beverley*, Bunb. 188.

(*a*) 2 Bl. Com. 435. 3 Bac. Abr. 66. Off. Ex. Suppl. 61, 62. 11 Vin. Abr. 178.

(*b*) Com. Dig. Baron & Feme, F. 3. 1 Roll. Abr. 911. Swinb. part 6. s. 7.

(*c*) *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343.

(*d*) *Graham v. Londonderry*, 3 Atk. 394.

(*e*) 3 Bac. Abr. 66. *Lord Hastings v.*

Sir A. Douglas, Cro. Car. 343.

(*f*) 2 Leon. 166. *Bindon's case*, Moore, 213.

(*g*) *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343. S. C. Jon. 332. Roll. Abr. 911. 11 Vin. Abr. 179. S. C.

(*h*) *Offley v. Offley*, Prec. Chan. 27.

(*i*) *Northey v. Northey*, 2 Atk. 77.

(*k*) 11 Vin. Abr. 180. *Nels. Chan. Rep.* 179.

(*l*) 1 Roll. Abr. 911.

[231] press purpose of wearing them, they shall be esteemed merely as paraphernalia, for if they were considered as a gift to her separate use, she might dispose of them absolutely, and so defeat his intention (*m*).

The husband, if inclined to so unhandsome an exercise of his power, may sell, or give away in his life-time, such ornaments and jewels of the wife, but he cannot dispose of them by will, any more than he can devise heir-looms from the heir (*n*). In case of a deficiency of assets for payment of debts, the widow shall not be entitled to such paraphernalia (*o*), not even if they were presents made to her by the husband before marriage (*p*); nor shall she be so entitled where there are not assets at the time of the husband's death, although contingent assets should afterwards fall in (*q*); on the principle, that the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her bona paraphernalia in memory of her husband could not have been answered, and therefore it is reasonable that in such case it should be reduced to a certainty, namely, that if there should not be assets real or personal at the testator's death, or at least when the jewels are applied in the payment of debts, then the jewels shall be liable.

But such ornaments, though subject to the debts, shall be preferred to the legacies of the husband, and the general rules of marshalling assets, (which will be treated of hereafter,) are applicable in giving effect to such priority (*r*).

If the husband pawn the wife's paraphernalia, and die, leaving a fund sufficient to pay all his debts, and to redeem the pledges, she is entitled to have them redeemed out of his personal estate (*s*). [232] So where a husband pledged a diamond necklace of the wife, as a collateral security for money borrowed on a bond, and authorised the pawnee to sell it during his absence, at a sum specified, it was held, that this amounted not to an alienation, if it were not sold in his lifetime, and that it was redeemable for his widow (*t*).

If a woman by marriage articles agree to claim such part only of the effects of the husband as he shall give her by his will, she is excluded from her paraphernalia (*u*). But her necessary apparel

(*m*) *Darley v. Darley*, 3 Atk. 398.

(*n*) 2 Bl. Com. 436. *Graham v. Londonderry*, 3 Atk. 394.

(*o*) 2 Bl. Com. 436. *Tipping v. Tipping*, 1 P. Wms. 730. *Tynt v. Tynt*, 2 P. Wms. 544. *Snelson v. Corbet*, 3 Atk. 369. *Bindon's case*, Moore, 216. 3 Bro. P. C. 187.

(*p*) *Ridout v. Earl of Plymouth*, 2 Atk. 104.

(*q*) *Burton v. Pierpoint*, 2 P. Wms. 80.

(*r*) 2 P. Wms. 80. note 1. *Tipping v. Tipping*, 1 P. Wms. 729. *Tynt v. Tynt*, 2 P. Wms. 542. *Lord Townsend v. Windham*, 2 Vez. 7. *Snelson v. Corbet*, 3 Atk. 369.

(*s*) *Graham v. Londonderry*, 3 Atk. 395.

(*t*) *Ibid.* 3 Atk. 393.

(*u*) 3 Bac. Abr. 66. * Com. Dig. Baron and Femic, F. 3. *Comely v. Comely*, 2 Vern. 19. S. C. 83.

shall, in all cases, be protected, as decency and humanity require, even against the claims of creditors (*v*). (1)

If the husband bequeath to the widow her jewels for her life, and then over, and she make no election to have them as her paraphernalia, her executor shall have no title to demand them (*w*).

(*v*) 2 Bl. Com. 436. 2 Roll. Abr. 911. (*w*) *Clarges v. Albemarle*, 2 Vern. 246.

(1) By the 3d section of the Act of 10th *April*, 1828, entitled "An Act for the relief of the Poor," (Pamph. Laws, 286,) if any person die after the first day of September, 1828, leaving a widow, and not leaving estate sufficient to pay his debts, exclusive of the articles enumerated in the first section, viz. household utensils not exceeding in value twenty dollars, the necessary tools of a tradesman not exceeding in value twenty dollars, all wearing apparel, two beds and the necessary bedding, one cow, two hogs, six sheep, with the wool thereof, and the yarn and cloth manufactured therefrom, and feed for the said cow, hogs, and sheep from the first of November to the last of May, a stove with the pipe of the same and necessary fuel, a spinning wheel and reel, and any quantity of meat not exceeding one hundred pounds, six bushels of potatoes, six bushels of grain and the meal made therefrom, and any quantity of flax not exceeding ten pounds, the thread or linen made therefrom, and all bibles and school books in the use of the family, his widow shall be allowed to retain the said articles for her own use, and that of her family.

CHAP. VI.

OF THE INTERESTS OF A DONEE MORTIS CAUSA.

ANOTHER species of interest in the personal property of the deceased remains to be considered. Such as vests neither in his executor, nor his heir, nor his widow, in those respective characters. It is created by a gift under the following circumstances. When in his last illness, and apprehensive of the approach of death, he delivers, or causes to be delivered to or for a party the possession of any of his personal effects, to keep in the event of his decease. Such gift is therefore called a *donatio mortis causa*. It is accompanied with the implied trust, that, if the donor live, the property shall revert to him, since it is given only in contemplation (a). (1)

A party's wife is as capable of such gift as any other person (b). (2) And so is a negro brought to England as a slave, for the moment he set foot on English ground he was free (c).

To substantiate the gift, there must be an actual tradition or delivery of the thing. The possession of it must be transferred in point of fact, and established by evidence beyond suspicion (d). (3) [234] The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order (e). (4) But there are cases, in which the nature of the subject will not admit of a corporeal delivery; and then if the party go as far as he can towards transferring the possession, his bounty shall

- (a) 2 Bl. Com. 514. 11 Vin. Abr. 176. Hedges v. Hedges, Prec. in Chan. 92.
 269. Drury v. Smith, 1 P. Wms. 404. (d) Walter v. Hodge, 2 Swans. Rep.
 (b) Lawson v. Lawson, 1 P. Wms. 441. (e) Ward v. Turner, 2 Vez. 431.
 441. Miller v. Miller, 3 P. Wms. 356. Tate v. Hilbert, 2 Ves. jun. 111. Drury
 (c) Shanley v. Harvey, 2 Eden's Rep. 126. Lawson v. Smith, 1 P. Wms. 404. Lawson v.
 Lawson, 441.

(1) *Wells v. Tucker*, 3 Binn. 370.

(2) So a delivery to the wife of the donor, for the use of a third person, is a sufficient delivery to make a good *donatio mortis causa*. *Wells v. Tucker*, 3 Binn. 366.

(3) To this principle is to be referred the decision in *Windows v. Mitchell*, 1 Murphy's Rep. 127, and upon this ground it may be sustained.

(4) There is no difference in the *delivery* required in cases of *donatio causa mortis*, and other cases of *parol* gifts; in all such cases, the only question is, whether the donor has parted with his *dominion* over the property or not; and hence if the possession pass from the donor to the donee in his presence, and with his consent, whether it be delivered by his hand or only by his direction is immaterial. *McDowell v. Murdock*, 1 Nott & McCord's Rep. 237.

prevail. Thus, a ship has been held to be delivered by the delivery of a bill of sale defeasible on the donor's recovery. And in a recent case, the Lord Chancellor seemed to be of opinion, that such donation might be effected by deed or writing (*e*).

The delivery also of the key of a warehouse, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for such a purpose (*f*). So the delivery of the key of a trunk has been decided to amount to a delivery of the trunk, and its contents (*g*). Nor in those instances were the key and bill of sale considered in the light of symbols, but as modes of attaining the possession and enjoyment of their property (*h*). So a bond (1) given in prospect of death, although a *chose* in action, is a good donation *mortis causâ*, for a property is conveyed by the delivery (*i*). Such, likewise, have been the decisions in [235] regard to bank notes (*k*). In all these cases, the donor delivers as complete a possession as the subject matter will permit.

But bills of exchange, promissory notes, (2) and checks on bankers, seem incapable of being the objects of such donation (*l*). The delivery of these instruments is distinguishable from that of a bond, which is a specialty, and itself the foundation of the action, the destruction of which destroys the demand; whereas the bills and notes are only evidence of the contract. (*m*).

Nor shall a delivery merely symbolical have such operation. As, where on a deed of gift not to take place till after the grantor's death, a sixpence was delivered by way of putting the grantee in possession; the ecclesiastical court held such delivery to be insufficient for the purpose, and pronounced for the instrument as a will (*n*). So it was determined in chancery, that the delivery of receipts for South Sea annuities was in like manner ineffectual, and that, to make it complete, there ought to have been a transfer of the stock (*o*). Least of all shall such donation be effectuated by parol, as, merely saying, "I give," without any act to transfer the property (*p*). Nor where a man considering himself dying took certain property out of an iron chest, and wrote the names of two persons upon the envelope containing it, and declared it to

(*e*) Tate v. Hilbert, 2 Ves. jun. 120.

(*f*) Ward v. Turner, 2 Vez. 434.

(*g*) Jones v. Selby, Prec. in Chan. 300. Ward v. Turner, 2 Vez. 441. Vide also Tate v. Hilbert, 2 Ves. jun. 116.

(*h*) Ward v. Turner, 2 Vez. 443.

(*i*) Sudgrove v. Baily, 3 Atk. 214. Ward v. Turner, 2 Vez. 441. Blount v. Burrow, 4 Bro. Ch. Rep. 72.

(*k*) Drury v. Smith, 1 P. Wms. 404.

Miller v. Miller, 3 P. Wms. 356. Hill v. Chapman, 2 Bro. Ch. Rep. 612.

(*l*) Miller v. Miller, 3 P. Wms. 356. Ward v. Turner, 2 Vez. 442. Tate v. Hilbert, 4 Bro. Ch. Rep. 291.

(*m*) Ward v. Turner, 2 Vez. 442.

(*n*) Ibid. 2 Vez. 440.

(*o*) Ibid. 2 Vez. 431.

(*p*) Ibid. 2 Vez. 444. Tate v. Hilbert, 2 Ves. jun. 120.

(1) Wells v. Tucker, 3 Binn. 366. Garduer v. Parker, 3 Madd. Rep. 184. And see Hurst v. Beach, 5 Madd. Rep. 351, which was the case of mortgage deeds and of a bond.

(2) Contra, Wright v. Wright, 1 Cowen's Rep. 598.

be his intention that they should have such property upon his death, and then returned it to the chest and kept the keys in his own possession, never having made an actual delivery thereof to the parties or to trustees for them (*q*). Nor shall a present absolute [236] gift be considered as of this denomination. To bring it within the class, it must be made to take effect only on the death of the donor (*r*). Therefore, the gift of a check on a banker, "Pay to self or bearer, two hundred pounds," and also of a promissory note, being absolute and immediate, was held clearly on that ground to be no *donatio mortis causâ* (*s*). But where the donor gave a bill on his banker with an indorsement expressing that it was for the donee's mourning, and giving directions respecting it, the bill was decided to be an appointment in the nature of such donation, since it was for a purpose necessarily supposing death (*t*).

Simple contract debts and arrears of rent are incapable of this species of disposition, because there can be no delivery of them (*u*).

Whether the delivery of a mortgage deed will amount to such gift of the money due on the security, seems to have been an undecided point (*v*), until very lately, but it has been recently held, that a mortgage, or a bond given as a collateral security for money due on mortgage, cannot be made the subject of a *donatio mortis causâ* (*w*).

If the donor die, the interest of the donee is completely vested; nor is it necessary that the gift should be proved as part of the will, it operating on the executor as a declaration of trust, and his assent [237] to it is not *requisite*, as in the case of a legacy (*x*). But the gift, however regularly made, shall not prevail against creditors (*y*).

Such is the interest which the executor, the heir, the successor, the devisee, the remainder-man, the widow, and the donee *mortis causâ* of the testator, respectively take in the personal effects.

(*q*) Bunn v. Markham, Holt's Rep. C. 2 Vez. 436. Hassell v. Tynte, Ambl. 352. 7 Taunt. Rep. 224. 318. 11 Vin. Abr. 178. Lawson v.

(*r*) Tate v. Hilbert, 2 Ves. jun. 120. Lawson, 1 P. Wms. 441. Miller v.

(*s*) Tate v. Hilbert, 2 Ves. jun. 111. Miller, 3 P. Wms. 357.

4 Bro. Ch. Rep. 286, S. C. (*w*) Duffield v. Elwes, 1 Sim. & Stu.

(*t*) Lawson v. Lawson, 1 P. Wms. 239. (*x*) 2 Bl. Com. 514. Tate v. Hilbert,

441. et vid. Tate v. Hilbert, 2 Ves. jun. 111. 2 Ves. jun. 120.

(*u*) Ward v. Turner, 2 Vez. 436. 442. (*y*) 2 Bl. Com. 514. Tate v. Hilbert,

(*v*) Vid. 3 P. Wms. 358. in note. S. 2 Ves. jun. 120.

CHAP. VII.

HOW EFFECTS WHICH AN EXECUTOR TAKES IN THAT CHARACTER MAY BECOME HIS OWN.

THE property which an executor takes in his representative capacity may, in certain instances, be converted into his own. As, first, in regard to the ready money left by the testator. On its coming into the hands of the executor, the property in the specific coin must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value; and therefore a creditor of the testator cannot by *feri facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution (*a*). So, if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own (*b*): (1) consequently if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself in an action of debt [239] thus brought for the same by the surviving executor of the first testator.

But if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favour of the executor, by the mere act and operation of law: in the former case his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution, for he is incapable of suing himself (*c*). (2)

So in the case of a lease of the testator devolved on the executor, such profits only as exceed the yearly value shall, as it has been already stated, be held to be assets: it therefore follows,

(*a*) Off. Ex. 89.

185. infr.

(*b*) Off. Ex. 89. Dy. 187 b. Plowd.

(*c*) Plowd. 185.

(1) *Livingston v. Newkirk*, 3 Johns. Cha. Rep. 312. But he cannot make the property of the testator his own by paying debts out of his own moneys to the value of the appraisement. *Hall v. Griffith*, 2 Harr. & Johns. 483. *Haslett's Adm. v. Glenn*, 7 Harr. & Johns. 17.

(2) In *Pennsylvania*, since the Act of 16th April, 1794, (Purd. Dig. 372. 3 Dall. Laws, 521. 3 Sm. Laws, 143.) an executor or administrator cannot retain his whole debt against creditors in equal degree when there is a deficiency of assets; he is only entitled to retain *pro rata*. *Ex parte Meason*, 5 Binn. Rep. 157.

that if the executor pay the rent out of his own purse, the profits to the same amount shall be his (*d*). There are likewise other means of thus changing the property : as if the testator's goods be sold under a *feri facias*, the executor, as well as any other person, may buy such goods of the sheriff ; and in case he does so, the property, which was vested in him as executor, shall be turned into a property in *jure proprio* (*e*).

If the executor among the testator's goods find, and take some, which were not his, and the owner recover damages for them in [240] an action of trespass or trover, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them (*f*).

If the grantee of the next presentation to a living die after the church becomes void, and before presentation, his executor shall have the benefit of presenting. Nor shall it be regarded as assets, since it is incapable of being sold (*g*). But if in that case a stranger shall present, and procure his clerk to be admitted, damages recovered by the grantee's executor in a *quare impedit* shall be assets (*h*).

(*d*) Off. Ex. 90, 91.

(*e*) Ibid. 91.

(*f*) Ibid.

(*g*) Off. Ex. 73. Shep. Touchst. 496.

(*h*) Off. Ex. 73.

CHAP. VIII.

OF THE INTEREST OF AN ADMINISTRATOR, GENERAL AND SPECIAL—
OF A MARRIED WOMAN EXECUTRIX OR ADMINISTRATRIX—OF SE-
VERAL EXECUTORS OR ADMINISTRATORS—OF THE EXECUTOR OF
AN EXECUTOR—OF AN ADMINISTRATOR DE BONIS NON—OF AN
EXECUTOR DE SON TORT.

As an administrator has the office and quality of an executor, the interest of the one in the property of the deceased is in all respects the same as that of the other (*a*). The interest of special or limited administrators is also, during its continuance, the same as that of an executor (*b*); but they are not vested (as will be shewn in its proper place) with the same powers and authority as belong to him (*c*).

If a married woman be an executrix, or administratrix, the husband has a joint interest with her in the effects of the deceased: such as devolves the whole administration upon him, and enables him to act in it to all purposes, with or without her assent (*d*). (1) [242] Therefore it is held that he may surrender or dispose of a term which was vested in her in that capacity, and such surrender or disposition shall be binding upon her (*e*). So a gift, or release of any part of the deceased's personal property by the husband alone shall be equally available (*f*); but the wife has no right to administer without the husband: and such acts as have been just mentioned, if performed by her without his concurrence, will be of no validity (*g*). In case of the husband's death, the interest never having been divested, shall survive to her; but if she die, it shall not survive to the husband, inasmuch as it belonged to him merely in her right, as representative of the deceased (*h*). And although, generally speaking, a feme covert cannot make a will without the assent of her husband, yet without his assent she may

(*a*) Off. Ex. 259. Off. Ex. Suppl. 48. 5 Co. 83. Blackborough v. Davis, 1 P. Wms. 43. vid. Hudson v. Hudson, 1 Atk. 460. and Jacomb v. Harwood, 2 Vez. 267. and infr.

(*b*) 2 Fonbl. 387.

(*c*) 11 Vin. Abr. 104, 105. 3 Bac. Abr. 13, 14.

(*d*) Yard v. Elaud, Ld. Rayn. 369. Com. Dig. Admon. D. Wankford v. Wankford, 1 Salk. 306. Off. Ex. 199.

Ankerstein v. Clarke, 4 Term Rep. 617.

(*e*) Thrustout v. Coppin, Bl. Rep. 801.

(*f*) Yard v. Ellard, Salk. 117. Off. Ex. 208.

(*g*) Wankford v. Wankford, Salk. 306. Off. Ex. 207, 208. Com. Dig. Admon. D. vid. supra, 9.

(*h*) Off. Ex. 208. Com. Dig. Baron and Feme, F. 1. Dy. 331.

(1) *Lindsay v. Lindsay's Adm.*, 1 Desaus. Rep. 153.

make a will, and continue the executorship in respect to the property thus vested in her in *auter droit* (*i*). Hence if the wife of A. have debts due to her in her own right, and be also executrix to B., and make a will without her husband's assent, appointing an executor, the will, in respect to the goods and credits which belonged to her as the executrix of B., shall be valid, and her executor may prove it in opposition to the husband. But as to the debts due to her in her private capacity, the will shall be void, and [243] the husband may take administration: she shall be considered as dying testate in regard to the property of which she was possessed as executrix, and as intestate in regard to that to which she was entitled in her own right (*k*).

If there be several executors or administrators, they are regarded in the light of an individual person.* They have a joint and entire interest in the testator's effects, which is incapable of being divided (*l*), and in case of death, such interest shall vest in the survivor (*m*).

So also an executor of an executor, in however remote a series, has the same interest in the goods of the first testator, as the first and immediate executor (*n*).

An administrator *de bonis non* has also the same interest in such of the effects as remain unadministered, as was vested in the executor, or antecedent administrator.

An executor *de son tort* has no interest whatever in the property, and therefore can maintain no action in right of the deceased (*o*). (1)

[244] But if the executor *de son tort* take out administration, it shall to most purposes qualify the wrong, and vest the same interest in him as in other administrators, and consequently such as shall have relation to the time of the intestate's death (*p*). (2)

(*i*) 2 Bl. Com. 408. Off. Ex. 199. 259. 11 Vin. Abr. 240. 4 Burn. Eccl. 3 Bac. Abr. 10. Off. Ex. Suppl. 20. L. 273. Shep. Touchst. 464.

(*k*) Off. Ex. 202.

(*o*) 11 Vin. Abr. 215. Parker v. Kitt,

(*l*) Com. Dig. Admon. B. 12. Dy. 23 b. 3 Bac. Abr. 30. Jacomb v. Harwood, 2 Vez. 267. and vid. infr.

12 Mod. 471, 472. 2 Bl. Com. 507.

(*m*) 6 Co. 36. Dy. 160. Eyre v. Countess of Shaftsbury, 2 P. Wms. 121. vid. supra, 37.

(*p*) 11 Vin. Abr. 214—217. Parker v. Kitt, 12 Mod. 471, 472. Kenrick v. Burges, Moore 126. Pyne v. Woolland,

2 Ventr. 179. 3 Bac. Abr. 25, 26. Curtis v. Vernon, 3 Term Rep. 590. Ibid.

(*n*) Com. Dig. Admon. G. Off. Ex.

2 H. Bl. 26.

(1) *Lee v. Wright*, 1 Rawle's Rep. 151. Nor be cited to account before the Register. *Peeble's Appeal*, 15 Serg. & Rawle, 41.

(2) *Shillaber v. Wyman*, *Andrew v. Gallison*, 15 Mass. Rep. 322, 325. *Rattoon v. Overacker*, 8 Johns. Rep. 97. 2d edit. *Contra*, *Green v. Dewit*, 1 Root. 183.

BOOK III.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

CHAP. I.

OF THE FUNERAL—OF MAKING AN INVENTORY—OF COLLECTING THE EFFECTS.

SECT. I.

Of the funeral.

THE subject now leads me to consider the powers and duties of an executor, or administrator (*a*).

And first he is to bury the deceased according to his rank and circumstances (*b*). It has been already stated, that an executor, before probate, may perform this pious office (*c*); and that the performance of it by a stranger shall not constitute him an executor *de son tort* (*d*). The expences attending it shall be allowed in preference to all debts and charges (*e*); (1) but the executor is not justified in incurring such as are extravagant (*f*). (2) Nor as

(*a*) 8 Co. 136.

(*b*) Offley v. Offley, Prec. Chan. 27.
Com. Dig. Admon. C.

(*c*) Supr. 46.

(*d*) Ibid. 40.

(*e*) 11 Vin. Abr. 432. Br. Tit. Executor, pl. 172. Dr. and Stud. Dial. 2. c. 10.

(*f*) 2 Bl. Com. 508.

(1) By the 14th section of the Act of 19th April, 1794, (Purd. Dig. 376. 3 Sm. Laws, 132.) executors and administrators are to pay, so far as they have assets, the debts in the following order; *first*, physic, funeral expenses, and servants' wages; *second*, rents, &c.

(2) *McGlinsey's Appeal*, 14 Serg. & Rawle, 64. *Metz's Appeal*, 11 Serg. & Rawle, 205. And the Court have refused to allow the administrator a sum of money charged against the estate of the intestate for mourning for the family, as against those of the next of kin who received no part of the mourning. *Flintham's Appeal*, 11 Serg. & Rawle, 16. See also *Johnson v. Baker*. 2 Carr. &

[246] against creditors shall he be warranted in more than are absolutely necessary. In strictness, no funeral expences are allowed in the case of an insolvent estate, except for the coffin, shroud, and ringing the bell, the fees of the parson, clerk, sexton, and bearers; but not for the pall, or ornaments (*g*). Still less shall charges for feasts and entertainments be admitted; and indeed in any case they seem incongruous to so mournful an occasion (*h*). If the executor neglect the observance of these rules he will be chargeable with a species of devastation or waste of the testator's property, which shall be prejudicial only to himself, and not to the creditors, or legatees (*i*).

The executor must also prove the will; or, in case of intestacy, the next of kin must take out administration, within the six months limited by the statute, provided they respectively act (*k*).

A memorial and registry are also required by different acts of parliament (*l*) of all wills which affect any lands or tenements in the county of York, or Middlesex, excepting copyhold estates, leases at a rack-rent, or leases not exceeding twenty-one years, [247] where the actual possession accompanies the lease, and chambers in Serjeant's Inn, the Inns of Courts, and Inns of Chancery.

SECT. II.

Of the making of an inventory by the executor, or administrator.

AN executor, or administrator, before he administers, except by the performance of such acts as cannot be deferred, as disposing of perishable articles (*a*), is likewise bound, pursuant to the stat. 21 H. 8. c. 5. (1) passed in affirmance of the ecclesiastical law, to make

(*g*) *Shilleg's case*, Salk. 296. L. of Ni. Pri. 143. 4 Burn. Eccl. L. 301. Off. Ex. 174. *Greenside v. Benson*, 3 Atk. 249. 3 Bac. Abr. 85.

(*h*) Off. Ex. 131.

(*i*) 2 Bl. Com. 508. *Godolph.* p. 2. c. 26. s. 2.

(*k*) Vid. *supr.* 43. 65. 96.

(*l*) Stat. 2 and 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. 2. c. 6. vid. 2 Bl. Com. 343.

(*a*) 4 Burn. Eccl. L. 250. *Swimb.* p. 6. s. 8.

Payne's Rep. 207. This case, though of general application and some importance, has been omitted by the Editors of the *English Common Law Reports*, in preparing the 12th volume of that publication.

(1) That part only of the stat. 21 H. 8. c. 5. is in force in *Pennsylvania*, which relates to the persons to whom administration is to be granted, (3 Binn. 618. *Roberts' Dig.* 250.) The practice, however, has always been for the executor to file an inventory, and appraisement of the personal estate of the testator, according to the course pointed out in the text, though there is no provision in any act of Assembly requiring an executor so to do, except in the cases set forth in the 1st sect. of 27th *March*, 1713, (*Purd. Dig.* 610. 1 *Dall. Laws*, 98. 1 *Sm. Laws*, 81)

an inventory of the deceased's personal estate and effects, in the presence of at least two of his creditors, or legatees, or next of kin: and in their default, or absence, of two other honest persons; and the same shall cause to be indented, of which one part shall be delivered in to the ordinary upon oath, and the other part shall remain in the possession of such executor, or administrator. And the ordinary shall not, under the penalty of ten pounds, refuse to take such inventory, when so presented to him (*b*). Also, by [248] the stat. 22 & 23 *Car.* 2. c. 10. as hath been before mentioned (*c*), an administrator must enter into a bond, with two or more securities, conditioned, among other things, for his exhibiting into the registry of the court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession (*d*). (1)

An inventory is thus required for the benefit of creditors, and legatees, or parties in distribution (*e*). It must be written or engrossed on paper or parchment duly stamped (*f*). It is to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causæ* of the testator, or intestate (*g*). It must also distinguish such debts as are sperate, and those which are doubtful, or desperate (*h*). By the executor it must be exhibited within a competent time: what shall be so considered, depends on the discretion of the ordinary, regulated by the distance at which the goods lie from the residence of the executor, and other circumstances (*i*). An administrator is [249] bound pursuant to the stat. of *Car.* 2. to exhibit his inventory before the ordinary by the time specified in the condition of the bond, and must do so at his peril (*k*). (2)

(*b*) 3 Bac. Abr. 45. 4 Burn. Eccl. 4 Burn. Eccl. L. 253, 254.
L. 251.

(*c*) Supr. 97.

(*h*) 4 Burn. Eccl. L. 254. 3 Bac. Abr. 47. L. of N. P. 140.

(*d*) 3 Bac. Abr. 46. 11 Vin. Abr. 358.

(*i*) 3 Bac. Abr. 47. Swinb. p. 6. s. 8.

(*e*) 3 Bac. Abr. 45. Swinb. p. 6. s. 6.

4 Burn. Eccl. L. 265.

(*f*) Vid. Append.

(*k*) 3 Bac. Abr. 47. Archbishop of

(*g*) 2 Bl. Com. 510. 3 Bac. Abr. 47. Canterbury v. Wills, Salk, 251.

(1) In *Pennsylvania* the register is bound, upon granting administration of the goods and chattels of persons dying intestate, to take bonds conditioned for making a true and perfect inventory of the goods of the deceased, which have or shall come to his hands, possession, or knowledge, with two or more sufficient sureties, (Act of 19th *April*, 1794. *Purd.* Dig. 373. 3 *Dall.* Laws, 521. 3 *Sm.* 143.) And by the second section of the act of 27th *March*, 1713, (*Purd.* Dig. 611. 1 *Dall.* Laws, 98. 1 *Sm.* Laws, 81,) "Where any letters of administration shall be granted, and no bond with sureties given, as the law in that case requires, such letters of administration shall be void, and of none effect; and the officer or person that grants the same, and his sureties, shall be, *ipso facto*, liable to pay all such damages as shall accrue to any person or persons by occasion of granting such administration."

(2) The inventory, by the first section of the act of 19th *April*, 1794, must be

And the judge has authority to cite or summon either of them for such a purpose, not only at the suit of a party, but at his own discretion (*k*); and if they neglect bringing in the inventory, to pronounce them contumacious (*l*).

In point of law, nevertheless, it is the duty both of an executor and an administrator, of their own accord (*m*), to exhibit an inventory; the former within a reasonable time, the latter at the time limited by the condition of the administration bond. And the courts formerly considered the neglect of this duty in a light unfavourable to the party, especially where there was a deficiency of assets: and although not conclusive against him, yet as exposing him to imputation; and that the omission was the less to be excused, since neither at law nor in equity is the inventory final; it is permitted him to shew that the assets come to his hands amount, from unforeseen circumstances, to less than he may have originally stated them (*n*). But although such be the legal obligation imposed on an executor or administrator, in every case, to produce an inventory, yet the practice of the spiritual courts seems in this point to have been gradually relaxing: at one period it appears to have [250] been usual for the executor, or administrator, after probate, or administration, to exhibit an inventory, which was considered as authenticated by the general oath he had taken for the due execution of the will, or administration of the effects, and for exhibiting a true inventory. Yet then he was liable to be called upon to exhibit a farther inventory on his special oath, at the suit of a party interested (*o*). But according to the practice which at present prevails, neither the executor, nor administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the spiritual court at the suit of a creditor or legatee, or party in distribution (*p*); and in that case he is bound to exhibit an inventory and account (*q*); and his former general oath will not be sufficient; but the inventory thus exhibited must be verified by a special oath, either personally, or by virtue of a commission (*r*). The court however may exercise a discretion as to the sort of inventory it will accept, particularly in complicated cases (*s*).

(*k*) Com. Dig. Admon. B. 7. 4 Burn. Eccl. L. 250. 265. Sed vid. Petit v. Smith, 5 Mod. 247.

(*l*) Griffiths v. Bennett, 2 Phill. 364.

(*m*) Stat. 21 Hen. 8. c. 5. Archbishop of Canterbury v. Wells, 1 Salk. 251.

(*n*) 4 Burn. Eccl. L. 252. Orr v. Kaines, 2 Ves. 193.

(*o*) 4 Burn. Eccl. L. 250. 265, 266. 1 Ought. 344.

(*p*) Ex relat.

(*q*) Phillips v. Bignell, 1 Phill. Rep. 239. Myddleton v. Rushout, ibid. 224.

(*r*) 4 Burn. Eccl. L. 266.

(*s*) Reeves v. Freeling, 2 Phill. 56.

furnished within one month, and the administrator must settle his accounts within one year. And the bond of the administrator is forfeited unless there be a literal compliance with the words of the act. *Comm. v. Bryan*, 8 Serg. & Rawle, 128. *Campbell, Register, &c. v. Adcock*, stated 8 Serg. & Rawle, 132.

It is, however, the part of a prudent person, who sustains this office, in every case to see that the effects are carefully appraised, and reduced into an inventory, not only because he may be cited hereafter to produce it, but also because a distinct and accurate knowledge of the fund is necessary, as will more clearly appear from the sequel of this work, to direct him in the safe execution of the trust. Indeed, if a party administer without making an [251] inventory, the law will suppose him to have assets for the payment of all the debts and legacies, unless he repel the presumption; (1) whereas if he make an inventory, he shall not be presumed to have more effects of the deceased than are comprised within it, and the proof of any omission is then thrown on the opposite party (s).

But it is not necessary, according to the modern practice, that the appraisement and inventory should be made exactly pursuant to the letter of the statute. If the effects appear to have been appraised fairly, and by persons of repute, and reduced into an inventory, such inventory shall obtain credence, unless it be falsified by the adverse party (t). And an inventory may be dispensed with altogether, if it shall appear clearly to the court to be unnecessary (u). As, where A. died possessed of a large personal estate, and appointed his eldest son executor; and, among other bequests, gave his second son two thousand pounds, to be paid at three several payments: the second son cited his elder brother before the judge of the prerogative court where the will was proved, in order to compel him to bring in an inventory; but it appearing that the two first payments had been made, and the third had been tendered, the judge decided, that there was no need of an inventory [252] at the instance of the plaintiff; and the sentence was affirmed by the delegates, first on appeal, and afterwards on a commission of review (v).

On the other hand, the judge will, in special cases, at the instance of a party interested, decree an inventory to be exhibited by the executor, or administrator, before the issuing of the probate, or letters of administration, under seal; and such inventory must also be substantiated by a special oath (w). Also, under particular circumstances, before the granting of the probate, or letters of administration, the court will, on the petition of a party interested, instead of requiring such inventory, issue a commission for the appraisement and valuation of the goods, rights, and credits, and inspection of the bonds, leases, and other writings relative to the personal estate of the deceased, at his house, or elsewhere, on the day

(s) 4 Burn. Eccl. L. 265, 266. Swinh.

(v) Boone's case, Raym. 470.

p. 6. s. 6.

(w) 4 Burn. Eccl. L. 266. 1 Ought.

(t) Ibid. 1 Ought. 344.

344.

(u) Ibid. 265.

(1) *Leeke's Adm. v. Beanes*, 3 Harr. & Johns. 573, *contra*.

specified, with such continuation of time and place as may be necessary (*x*).

In cases of this nature there also usually issues a monition to the other party in special, and to all others in general, with whom any of such effects of the deceased remain, requiring them to exhibit the same to the appraisers under such commission, at the time [253] and place appointed for its execution, in order that they may be appraised and inserted in the inventory (*y*).

And on such commission being duly executed, the inventory shall be brought in and exhibited, signed by the hands of the appraisers, or two of them at the least, but without the oath of the party (*z*).

In such case, also, an inventory is often required on the executor's or administrator's oath, of such goods of the deceased as have been already disposed of (*a*). But after an inventory is exhibited, a creditor cannot impeach it in the ecclesiastical court; for the stat. 21 Hen. 8. which requires an executor or administrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the ordinary; and the ordinary is bound to receive the same on its being so presented (*b*).

Yet a creditor may state objections to the inventory, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor be still dissatisfied, he may have recourse to equity for more effectual relief (*c*). But where a creditor gave in an allegation, pleading an omission in the inventory, to which the executrix put in a declaration instead of a specific answer, the court held that such creditor was entitled to have a *constat* of the assets that had come to her hands; and admitted the allegation (*d*).

[254] By the custom of London, if any man, or woman, free of the city, die leaving an orphan within age, and not married, the mayor and aldermen may compel the executor, or administrator, to appear at a court of orphanage, and exhibit an inventory. And in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal may commit him till compliance. Nor shall his having given security to the spiritual court, as above-mentioned, release him from the obligation of the custom (*e*).

(*x*) 4 Burn. Eccl. L. 266. 1 Ought. 344.

(*y*) 4 Burn. Eccl. L. 266. 1 Ought. 344, 345.

(*z*) 4 Burn. Eccl. L. 267. 1 Ought. 345.

(*a*) 4 Burn. Eccl. L. 267. 1 Ought. 345.

(*b*) 4 Burn. Eccl. L. 267. Catchside

v. Ovington, Burr. 1922. Hinton v. Parker, 8 Mod. 168. 2 Fonbl. 418. note (*d*).

(*c*) 2 Fonb. 418. note (*d*).

(*d*) Barclay v. Marshall, 2 Phill. Rep. 188.

(*e*) Com. Dig. Guardian, G. 1. 1 Roll. Abr. 550. Truck's case, Hob. 247.

SECT. III.

Of his collecting the effects.

THE next duty of the executor, or administrator, is to collect all the goods and chattels so inventoried. For that purpose, the law invests him with large powers, and authority. As representative of the deceased, we have seen, he has the same property in the effects as the principal had when living; he has also the same remedies to recover them (*a*). Within a convenient time after the testator's death, or the grant of administration, he has a right to enter the house descended to the heir, in order to remove the goods (*b*), provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find the key. He has, also, a right to take deeds and other writings relative to the personal estate out of a chest in the house, if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action (*c*). On the other hand, if the executor or administrator on his part be remiss in removing the goods within a reasonable time, the heir may distrain them as damage feasant (*d*).

The executor has also a right, on producing the probate at the bank, and causing so much of it as relates to the testator's interests [256] in the several stocks to be entered in the proper offices according to the acts of parliament which regulate this species of property, to have the same transferred from the testator's name into his own, or to such person as he shall appoint; and even in the case of a specific bequest of stock, the executor is entitled to call upon the bank for a transfer, and on their refusal, they are subject to an action at his suit. It is personal property, and subject to all its incidents (*e*). The administrator has the same right on producing the letters of administration.

The executor or administrator has likewise authority to sell or dispose of the deceased's effects, and convert them into ready money, to answer the purposes of the trust (*f*).

(*a*) 2 Bl. Com. 510. Harg. Co. Lit. 209.

(*b*) Vid. Harg. Co. Litt. 56 b.; and supr. 46.

(*c*) Off. Ex. 92, 93. 11 Vin. Abr. 267. Shep. Touchst. 470.

(*d*) Off. Ex. 93. Plowd. 280, 281. vid. Stodden v. Harvey, Cro. Jac. 294. and Harg. Co. Lit. 56 b.

(*e*) See stat. 5 Wm. & Mary, c. 20. The Bank of England v. Moffat, 3 Bro. Cl. Rep. 269. Vid. also Dougl. 524.

(*f*) 2 Bl. Com. 510. 11 Vin. Abr. 270. Humble v. Bill, 2 Vern. 445. 1 Bro. P. C. 71. Paget v. Hoskins, Gilb. Rep. Eq. 113. Nugent v. Gifford, 1 Atk. 463. Whale v. Booth, 4 Term Rep. 625. in note.

He has power to sell (*g*), or, as it has been held, to mortgage terms of years, or assign mortgaged terms (*h*), and to dispose of any of the effects, although, as it seems, specifically given by the will (*i*), and even in satisfaction of his own private debt (*k*). (1) Nor when he has aliened the assets can a creditor follow them at law; (2) for the demand of a creditor is only a personal demand [257] against the executor in respect of the assets come to his hands, but no lien on the assets. Equity will, indeed, follow assets on voluntary alienations by collusion with the executor; but if the alienation or pledge be for a valuable consideration, unless fraud be proved, neither law nor equity will defeat it; (3) for a purchaser from an executor has no means of knowing the debts of the testator; and if a court of equity on the subsequent appearance of debts would controul such purchasers, all dealings with executors would be dangerous (*l*).

An executor is entitled to recover by action, or other legal remedies, or by suit in equity, whatever pertains to such personal estate (*m*).

He is also empowered to redeem such chattels as the deceased may have left in pledge (*n*).

Temporary administrators, as an administrator *durante absentio*, or *durante minoritate*, or *pendente lite*, have not, as we shall hereafter see, so unlimited an authority to sell or alienate the testator's property. They may dispose *bona peritura* from necessity, and to prevent an irreparable loss to the estate; and on the same principle they may maintain actions to recover the debts of the deceased (*o*). But where the widow of an intestate delivered goods back to a creditor in satisfaction of his demand, in an action of trover by the lawful administrator, it was held, that such creditor could not protect his possession, upon the ground of such delivery having been made by one, who had by such intermeddling made herself *executrix de son tort*; no fact appearing to give colour to

(*g*) Ewer v. Corbett, 2 P. Wms. 148. Buring v. Stonard, ib. 150. Barnard. 78. Elliot v. Merriman, 2 Atk. 41. Jacob v. Harwood, 2 Vez. 265.

(*h*) Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 3 Atk. 235. sed vid. Bonny v. Ridgard, cited 2 Bro. Ch. Rep. 438.

(*i*) Ewer v. Corbett, 2 P. Wms. 148. vid. 2 Bro. Ch. Rep. 431.

(*k*) Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 3 Atk. 235. Ja-

comb v. Harwood, 2 Vez. 265. Ewer v. Corbett, 2 P. Wms. 149. note 2. vid. 2 Bro. Ch. Rep. 431.

(*l*) Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 3 Atk. 237. Crane v. Drake, 2 Vern. 616. McLeod v. Drummond, 14 Ves. jun. 353.; and S. C. 17 Ves. jun. 152.

(*m*) Vid. supr. 157.

(*n*) Vid. supr. 164.

(*o*) Vid. supr. 404. and Walker v. Woollaston, 2 P. Wms. 584.

(1) *Contra*, *Graff v. Castleman et al.*, 5 Rand. Rep. 195. *Dodson v. Simpson*, 2 Rand. Rep. 294. And see *Field v. Schieffelin*, 7 Johns. Rep. 157. *Petrie v. Clark*, 11 Serg. & Rawle, 377.

(2) 11 Serg. & Rawle, 385.

(3) *Knight v. Farborough*, 4 Rand. Rep. 367. *Sutherland v. Brush*, 7 Johns. Cha. Rep. 17.

her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated (*p*).

(*p*) Mountford v. Gibson, 4 East. 441.

[258] CHAP. II.

OF HIS PAYMENT OF DEBTS IN THEIR LEGAL ORDER.

SECT. I.

*Of debts due to the crown by record, or specially.
Of certain debts by particular statutes.*

THE disposition of the property when thus collected, and which constitutes assets, is next to be discussed. And, first, I shall treat of the application of the assets in the order prescribed by law. He must, in the first place, pay all funeral charges, and the expences of proving the will, or of taking out letters of administration (*a*). Secondly, he must pay the debts of the deceased, and in such payment he must be careful to observe the rules of priority; for, if he pay those of a lower degree first, on a deficiency of assets he must answer those of a higher out of his own estate (*b*). (1)

(*a*) 2 Bl. Com. 511. Off. Ex. 130, 131.

(*b*) 2 Bl. Com. 511. Shep. Touchst.

(1) "All debts owing by any person within this state, at the time of his or her decease, shall be paid by his or her executors or administrators, so far as they have assets, in the manner and order following; *first*, physic, funeral expenses, and servants' wages; *second*, rents, not exceeding one year; *third*, judgments; *fourth*, recognizances; *fifth*, bonds and specialties; and all other debts shall be paid without regard to the quality of the same, except debts due to the Commonwealth, which shall be last paid; but if there shall not be assets enough to discharge and pay such bond and specialties and other debts, then, and in such case, the same shall be averaged, and the said creditors paid *pro rata*, or an equal sum and proportion in the pound, so far as the assets will extend, first paying the bonds and specialties aforesaid; for which purpose the executors or administrators of such deceased person shall or may apply to the Orphans' Court of the proper county, which is hereby empowered to appoint three or more auditors, to settle and adjust the rates and proportions of the remaining assets due and payable to such respective creditors accordingly: *Provided, nevertheless*, That no creditor who shall neglect to exhibit his account to the executors or administrators, within twelve months after public notice given in one or more of the public newspapers published in this state, and continued in such public newspapers for four weeks, shall be entitled to receive any dividend of such remaining assets." Act of 19th April, 1794, s. 14. (Purd. Dig. 376. 3 Dall. Laws, 521. 3 Sm. Laws, 143.)

Under this act it has been decided, that the order of payment of the debts due

But if there be a sufficiency of assets for payment of debts, he may pay simple contract debts not bearing interest before specialty debts bearing interest, if not objected to by the specialty creditors, and the legatees are not at liberty to complain of the order of payment [259] (b). The more clearly to trace the order which the law prescribes for the payment of debts, and which the executor, or administrator, is thus bound at his peril to observe, it is necessary to consider them under a variety of classes.

They are distinguished, then, first, into debts due to the crown by record, or specialty: secondly, certain debts created by particular statutes: thirdly, debts of record in general: fourthly, debts due by specialty: fifthly, debts due by simple contract, first, to the king; and, secondly, to a subject.

To all other debts, of whatever nature, as well of a prior as of a subsequent date, such as are due to the crown by record or specialty claim the precedence (c). (1)

(b) *Turner v. Turner*, 1 Jac. & Walk. Off. Ex. 133. *Littleton v. Hibbins*, Cro. Eliz. 793. Com. Dig. Admon. C. 2. *Erby v. Erby*, 1 Salk. 80.

(c) 11 Vin. Abr. 295. 5 Bac. Abr. 79.

by a decedent is according to the nature of the debt at the time of his decease, which nature is not changed by obtaining a judgment against his executor or administrator. *Woolering v. Stewart's Adm.* 2 Yeates, 483. *Prevost v. Nicholls*, 4 Yeates, 479. *Scott v. Ramsay*, 1 Binn. 221.

"Physic" includes medical services rendered to the decedent, or his family, and for which in his lifetime he was liable, and is not confined to those rendered in the last illness of the decedent himself. *Bond's Case*, Orph. Ct. Phila. County. MS. *Hallowell*, Prest. diss. *Rouse v. Koontz's Adm.* Sup. Court MS. 1828. Lancaster.

Under the description of "Servants," those persons only are included who form part of a family, and are employed to assist in the economy of the house, or its appurtenances, and not labourers or workmen. *Ex parte Meason*, 5 Binn. 167. A bar-keeper in a tavern has been held to be a "servant" within the meaning of the act. *Boniface v. Scott*, 3 Serg. & Rawle, 351.

(1) The fifth section of Act of Congress of March 3d, 1797, (*Ingersoll's Abr.* 561. Pamph. Laws, vol. 3. p. 423.) entitled, "An act to provide more effectually for the settlement of accounts between the *United States* and receivers of public money," provides, "that where any revenue officer, or other person hereafter becoming indebted to the *United States* by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due to the *United States*, the debt due to the *United States* shall be first satisfied." And the duty act of the 2d March, 1799, c. 128. s. 65. (*Ing. Abr.* 156. Pamph. Laws, vol. 4. p. 386.) provides, "that in all cases of insolvency, or where the estate in the hands of executors or administrators or assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due the *United States* on any such bond, or bonds, shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any such debt due by the person or estate for whom or for which they are acting, previous to the debt or debts due to the *United States* from such person or estate being first duly satisfied and paid, shall become answerable, in their own person or estate, for the debt or debts so due to the *United States*, or so much thereof as may remain due and unpaid, in the proper Court having cognizance thereof." And, "that if the principal in any bond which shall be given to the *United States* for duties on goods, wares, or merchandize import-

Debts secured to the king by specialty are of the same degree with those of record: for by the stat. 33 *II.* 8. c. 39. it is enacted, that all obligations and specialties taken to the use of the king, shall be of the same nature as a statute staple (*d*). The king, by his prerogative, is to be preferred before other creditors, inasmuch as the law regards the royal revenue as of more importance than [260] any private interest (*e*). Therefore, an executor, whose testator was indebted by matter of record to the king, may plead to an action brought by a judgment creditor, or any other creditor, that the testator died thus indebted to the crown, and hath not left assets more than to satisfy the same, and such plea shall be valid; but the defendant must shew the record in certain (*f*). So if the creditor proceed to sue out execution on a statute-merchant, or staple, the executor, on setting forth this matter, will be relieved on an

(*d*) Off. Ex. 134.

(*e*) 3 Bac. Abr. 79. Off. Ex. 133.

(*f*) Off. Ex. 134. Com. Dig. Admon.

C. 2.

ed, or other penalty, either by himself, his factor, or other person for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators, or assignees, shall be insufficient for the payment of his or her debts, and if in either of the said cases any surety on the said bond or bonds, or the executors, administrators, or assignees of such surety, shall pay to the *United States* the money due upon such bond or bonds, such surety, his or her executors, administrators, or assignees, shall have and enjoy the like advantage, priority, or preference, for the recovery and receipt of said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the *United States*; and shall and may bring and maintain a suit or suits, upon the bond or bonds, in law or equity, in his, her, or their name, or names, for the recovery of all moneys paid thereon."

The preference given by these provisions has been held to extend to debtors to the *United States generally*, and includes the case of a person becoming indebted to them as the indorser of a bill of exchange (*The U. States v. Fisher*, 2 Cranch, 358.); but the priority does not partake of the character of lien on the property of public debtors (*The U. States v. Fisher*, *The U. States v. Hooe*, 3 Cranch, 90.); and it will not be waived by proving against their debtor under a commission of bankruptcy, and voting in the choice of assignees, (*Harrison v. Sterry*, 5 Cranch, 289.) nor can any agent of the *United States* destroy their priority by proving their debt under a commission of bankruptcy in *England*, voting for assignees, or laying an attachment against the property of the bankrupts. (*Per Curiam*, Bee's Rep. 246.)

Though the priority be limited to certain specified cases whilst the debtor is living, it takes effect generally upon his death (*Comm. v. Lewis*, 6 Binn. 266. *Dictum* of Marshall, C. J. 2 Cranch, 390.); but it seems, that in order to bind an executor or administrator, notice is necessary of the debt due to the *United States*, or no *devastavit* will be created by his making payment to creditors in the ordinary course of business, (*Dictum* of Marshall, C. J. *U. States v. Fisher*, 2 Cranch, 391. n. 16 Johns. Rep. 85.)

The right of the surety, who pays a bond to the *United States*, is only a right to receive payment out of the *effects* of the principal, as fully as the *United States* would have by reason of their right of priority; and therefore where the principal has been discharged under a bankrupt or an insolvent law, he may plead his certificate or discharge to a suit brought against him by such surety, although the *United States* would not have been barred thereby. (*Reed v. Emery*, 1 Serg. & Rawle, 339. *Aikin v. Dunlap*, 16 Johns. Rep. 77.)

audita querela (*g*). But the debts due to the crown, which are so privileged, must be such as are due by matter of record, or by specialty, which, as we have just seen, are of the same nature (*h*). And, therefore, sums of money owing to the king on wood sales, sales of tin, or of other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. Hence, though fines and amercements in the king's courts of record are clearly debts of record, and entitled to such preference, yet amercements in the king's courts baron (*i*), or courts of his honours, which are not of record, have no such priority; nor have fines for copyhold estates, nor money arising from the sale of estrays within his manors, or liberties: for these are not debts of record. So whatever accrues to the king by attainder, or outlawry, is considered as a debt by simple contract before office found; and, although debts due to the person outlawed, or attainted, be by obligation, or other specialty, and the outlawry or attainder be of record, yet the law does not recognize the king's title before office found: for till then it does not appear by record that any such debt was due to the party (*k*).

So if the king's debtor by simple contract be outlawed on mesne process, the debt is not altered in its nature, nor shall it have precedence, as if the outlawry be subsequent to the judgment, and the debt therefore of record (*l*). Nor does the prerogative extend to a debt assigned to the king. Therefore it was held, where the obligee of a bond, after the death of the obligor, assigned it to the king, that the obligor's executors were warranted in satisfying a judgment recovered against him in his lifetime in preference to the bond (*m*): So also the arrears of rent due to the crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it seems, be regarded in the light of a debt by simple contract (*n*).

Such is the law in regard to debts due to the crown, by record, or specialty.

Next in order are certain specific debts, which, subsequently to those of which I have been treating, are, by particular statutes, to be preferred to all others; as forfeitures for not burying in woollen [262] by 30 *Car. 2. c. 3.*: money due for letters to the post office by 9 *Ann. c. 10.*: and money due from the overseers of the poor by 17 *Geo. 2. c. 38. (o)*.

(*g*) 3 Bac. Abr. 79. Off. Ex. 135.

(*h*) 3 Bac. Abr. 79. Off. Ex. 133. 134.

(*i*) 3 Bl. Com. 25.

(*k*) 3 Bac. Abr. 80. Off. Ex. 134. Com. Dig. Admon. C. 2.

(*l*) Com. Dig. Admon. C. 2. Erby v.

Erby, 1 Salk. 80. 11 Vin. Abr. 291.

(*m*) Com. Dig. Admon. C. 2. 11 Vin. Abr. 301. Lane 65.

(*n*) 3 Bac. Abr. 80. Off. Ex. 135.

(*o*) 3 Bac. Abr. 80. in note. 2 Bl. Com. 511. 4 Burn. Eccl. L. 301.

SECT. II.

Of the debts of record in general.—Of judgments; and herein of decrees.—Of statutes, and recognizances.—Of docketting judgments.

To these succeed debts of record in general, of which there are two classes: first, judgments in courts of record; and secondly, statutes and recognizances. The former are of a higher nature and of a greater dignity than the latter; for judgments are recovered on judicial proceedings in litigated cases, and in a regular course of justice; and the records of such judgments are entered on public rolls entrusted to the custody of a sworn officer; also judgments confessed by the testator are on the same footing; for though, in point of fact, they are voluntarily acknowledged, yet they, as well as other judgments, are presumed to have been given adversely; the law supposes, *quod judicium redditur in invitum* (a).

[263] Hence judgments, as well such as were recovered against the testator, as those which were confessed by him, are in a precedent degree to statutes and recognizances; for statutes and recognizances (of the nature of which I shall more fully speak), are entered into by the consent of the parties; the former, and till enrolment, the latter, are carried in pockets, or deposited in escritoirs; in short, are in the private keeping of the creditor himself. Nor does priority of the date make any difference in favour of such last-mentioned securities (b). An executor is obliged to discharge a later judgment, in preference to a statute, or recognizance, prior in point of time (c).

Such is the preference to which judgments, as distinguished from the more private records, are entitled. Nor is this privilege confined to judgments in the courts of Westminster-hall, but extends itself to judgments in all other courts of record; that is to say, courts in cities, or towns corporate having power by charter, or prescription to hold plea of debt above forty shillings, as, in London, Oxford, and other places: for, although in the first instance, such goods only can be taken in execution on those judgments as lie within the jurisdiction of those respective courts; yet, [264] formerly, if the record were removed into the chancery by *certiorari*, and thence by *mittimus* into one of the superior courts of law, execution might have been had upon the defendant's goods in any county in England (d); and now by the stat. 19 Geo. 3. c. 70, any of his majesty's courts of record at Westminster may, on a proper application, cause the records of such judgments to be removed thither, and may issue writs of execution against the per-

(a) 3 Bac. Abr. 80. Off. Ex. 136. Hob. 195. 11 Vin. Abr. 292. in note 139. Com. Dig. Admon. C. 2. Roll. Abr. 926. Littleton v. Hibbins, Cro. Eliz. 793. (c) Off. Ex. 137. Com. Dig. Admon. C. 2. 4 Co. 59, 60.

(b) 4 Co. 60. 5 Co. 28. Off. Ex. 137. (d) Off. Ex. 139. Swinb. p. 6. s. 16.

sons or effects of the defendants, in the same manner as on judgments obtained in those superior courts. So a judgment in a *pie poudre* court, which is a court of record incident to every fair and market, and is the lowest court of justice (*e*) known to the law of England, claims the same preference (*f*); (1) and, by the above statute, its process, after judgment, shall be aided in the same manner. Nor does the priority of a judgment in any degree depend on the original cause of action; a judgment against the testator on a debt by simple contract is of the same nature as a judgment on a specialty (*g*). So if the testator were bound in a recognizance, on which a *scire facias* was brought and judgment given against him in his lifetime, although this judgment be not *quod recuperet*, as in case of actions on debt, but *quod habeat executionem*, yet since execution is the fruit and effect of all judgments, this is in sub-[265] stance of the same nature, and may well be classed as a debt by judgment (*h*).

Nor, as between one judgment and another, is priority of time material. The judgment creditor, who first sues out a *scire facias*, must be preferred; but, before such writ be sued out the executor has it in his election, where there are two judgment creditors, to pay which of them he pleases first; and if each bring a *scire facias* on his judgment, yet the executor may confess either action, at his option, and that although the *scire facias* were brought by the one creditor before the other (*i*). So where, after verdict for the plaintiff in *assumpsit*, and before the day in bank, the defendant died, and judgment was entered the next term, pursuant to the stat. 17 *Car. 2. c. 8.*, on *scire facias* brought against the executor, it was held, that the judgment should by relation be regarded as given in the lifetime of the testator, and be payable accordingly (*k*). But where the defendant in an action on simple contract, after an interlocutory judgment, died, and on *scire facias* against his administrator, a writ of inquiry issued, and damages assessed, judgment was entered up against the intestate; the court inclined to the opinion, that the judgment, pursuant to the stat. 8 & 9 *W. 3. c. 11.* [266] ought to have been entered up, not against the intestate himself, but against the representative; and was therefore not pleadable by the administrator to an action brought against him on a

(*e*) 3 Bl. Com. 32.

(*f*) 11 Vin. Abr. 297. *Searle v. Lane*,
2 Vern. 89.

(*g*) Vid. 3 Bl. Com. 158. 11 Vin.
Abr. 299. Com. Dig. Admon. C. 2.
Fitz. 76.

(*h*) Off. Ex. 139. Com. Dig. Admon.

C. 2. Vid. also *Gomersal v. Aske*, Yelv.
133.

(*i*) Off. Ex. 138. 11 Vin. Abr. 299.
301. 2 Fonbl. 2nd edit. 401.

(*k*) Com. Dig. Admon. C. 11 Vin.
Abr. 302. *Burnett v. Holden*, 1 Lev.
277. 1 Mod. 6. S. C.

(1) Judgments obtained before a justice of the peace, and filed in the office of the Common Pleas of the proper county, according to the act of Assembly, or made known to an administrator before he has paid away the estate, are entitled to the same priority as judgments obtained in a court of record. *Scott v. Ramsay*, 1 Binn. 221.

bond (*l*). In like manner, where a defendant died after a writ of inquiry *executed*, and before the return of it, it was adjudged that a *scire facias* lay against his executor, to shew cause why the damages assessed should not be recovered (*m*); nor in such case shall the judgment, if on simple contract, be preferred to a debt by specialty.

A judgment signed at any time during the term, or the vacation immediately subsequent, relates back to the first day of the term, although the defendant died before the judgment was actually signed; and an execution tested the first day of the term may be taken out upon it against his goods (*n*). (1) But, if the writ of execution be not tested till after the defendant's death, it is irregular, and, in such case, it is necessary to revive the judgment by *scire facias* against his representative (*o*).

If a judgment be kept on foot merely to defraud other creditors, or if there be any defeasance of it in force, such judgment shall not avail to preclude them from their debts (*p*).

[267] A judgment *quod computet*, in the obsolete action of account, is of a nature too incomplete to be privileged like other judgments (*q*).

A judgment in a foreign country is regarded, in our courts, merely as a debt by simple contract (*r*). (2)

Nor, as we have just seen, are judgments against an executor comprehended within the same class as those which are recovered against the testator (*s*).

(*l*) 11 Vin. Abr. 279. *Weston v. James*,
1 Salk. 42. Com. Dig. Plead. 2 D. 9.

(*m*) *Goldsworthy v. Southcott*, 1
Wils. 243.

(*n*) *Bragner v. Langmead*, 7 Term
Rep. 20.

(*o*) *Heapy v. Paris*, 6 Term Rep. 368.
Vid. also 7 Term Rep. 24.

(*p*) 3 Bac. Abr. 81. Off. Ex. 137.

(*q*) 11 Vin. Abr. 297. in note. *Searle*
v. Lane, 2 Freem. 103. Vid. L. of N.
Pr. 127.

(*r*) 11 Vin. Abr. 291. 2 Fonbl. 460.
Dupleix v. De Roven, 2 Vern. 540.

Walker v. Wiffen, Douglt. 1.

(*s*) Off. Ex. 138.

(1) *Leiper v. Levis*, Adm. 15 Serg. & Rawle, 108. *Den v. Hillman*, 2 Halst. Rep. 180. *Center v. Billingham*, 1 Cow. Rep. 33. But a judgment creditor of an insolvent debtor cannot gain a priority over other judgment creditors by taking out and levying on his goods a *fiery facias* founded upon a judgment entered after the debtor's death, and which, as well as the execution, has relation to the first day of the term preceding his death. *Leiper v. Levis*, Adm. *Wood v. Hopkins*, 2 Penn. N. J. Rep. 689.

(2) *Harris v. Saunders*, 6 Dowl. & Ryl. Rep. 471; in which it is stated, that in distributing assets, a foreign, (*i. e.* *Irish*) judgment, was not in practice treated as an *English* judgment, and entitled to priority. In *Pennsylvania*, however, a judgment obtained in another State, and made known to executors or administrators, is entitled to the same preference, it would seem, as judgments obtained in the Courts of the State. *Bond's Case*, Orph. Ct. Phila. Co. 2d Jan. 1823. M. S. The protection of the executor or administrator, who cannot be supposed personally bound to search for judgments in any other place than the records of the county where the deceased resided and died, is to be found in the provision contained in the 14th section of the Act of 19th April, 1792, (Purd. Dig. 376.) authorizing public notice to be given to creditors, who within twelve months after such notice are bound to exhibit their claims, or forfeit their claim to any share of the assets.

In case a *scire facias* be brought on a judgment after the executor has exhausted the assets in the discharge of such of the king's debts as are above mentioned, or in the satisfaction of other judgments, the defendant may plead generally, that he hath fully administered; and on that plea he may give evidence of those facts, and that will be a sufficient defence (*t*). But if an action be brought against an executor on a specialty, or other debt of an inferior nature, and a judgment against the testator remains unsatisfied, it must be pleaded specially (*u*).

It is held, that an executor, by bringing a writ of error on a judgment, may postpone to a statute, and the satisfaction of the [268] debt on the statute, pending the writ of error, shall be no *devastavit*, because it was out of his power to withstand the payment of it. The effect of the judgment is by the writ of error totally suspended (*v*).

But if no writ of error be brought on the judgment, and a creditor by statute take out execution, the executor is bound to avail himself of his remedy by *audita querela*, in order to secure a fund for the satisfaction of the judgment (*w*): and some authorities maintain, that though a writ of error be brought on the judgment, if he fail to resort to an *audita querela*, and suffer the statute to be executed, it will be a *devastavit* (*x*).

Nor is an executor bound to take notice of judgments in the Courts of King's Bench, Common Pleas, and Exchequer, unless they are docketted, that is, abstracted and entered in a book, pursuant to the stat. 4 & 5 *W. & M. c.* 20. (*y*). According to the true construction of that act, a judgment not docketted is put on a level with simple contract debts (*z*). If the executor have notice of the judgment, although not docketted, he may perhaps be warranted [269] in giving it a preference as a judgment, but if he in that case pay other debts first, he is clearly not liable as on a *devastavit*; thus to charge him it seems that no other than the prescribed notice would be sufficient (*a*). And a plea of *plenè administravit* to an action brought on such a judgment will be supported by evidence of payment of debts by specialty, or by simple contract (*b*).

On the same principle, a judgment not docketted according to the directions of the statute cannot be pleaded to an action on simple contract (*c*).

(*t*) Off. Ex. 138. vid. also Hickey v. Hayter, 6 Term Rep. 388. Sed vid. 3 Bac. Abr. 89. and in note.

(*u*) Parker v. Atfield, Ld. Raym. 678. S. C. Salk. 311. 2 Saund. 50.

(*v*) 11 Vin. Abr. 292. in note. ibid. 298, 299. in note. Bearblock v. Read, Cro. Eliz. 822. L. of Ni. Pr. 142. Yelv. 29.

(*w*) Off. Ex. 137.

(*x*) Ibid. 137. in note. vid. Bearblock v. Read, Cro. Eliz. 822.

(*y*) 3 Bl. Com. 397.

(*z*) Hickey v. Hayter administratrix, 6 Term Rep. 384.

(*a*) Per Lord Kenyon, C. J. ibid.

(*b*) Hickey v. Hayter, 6 Term Rep. 387, 388.

(*c*) Steel v. Roke, Bos. & Pull. 307.

But of such judgments, when docketted, an executor shall be presumed to have cognisance (*d*).

The provisions of the statute do not extend to judgments in inferior courts of record; and the executor is still bound to take notice of them at his peril (*e*), as he was, before that act, of the judgments of the courts at Westminster (*f*).

A decree in a court of equity is in respect to the course of administering assets, equivalent to a judgment at law, and shall stand [270] in the same order of payment (*g*). (1)

In general, actual and express notice of a decree is necessary to make it binding on purchasers. Notice by implication in respect to them is effectual only where a suit is depending. It never was the doctrine, that a decree after a cause is ended shall be constructive notice to purchasers; (2) but it is the pendency of a suit that creates such notice in their case, on the ground that a suit is a transaction in a sovereign court of justice, and every man is presumed to be attentive to what passes there (*h*), (3) and also on the policy of preventing the transfer of rights in litigation. But an executor shall be affected with implied notice of a decree obtained against the testator; therefore, where an executor paid a debt due by specialty, before a debt due by a decree, of which he had no actual notice, he was decreed to pay it over again out of his own estate (*i*).

Although an executor cannot plead or give in evidence at law (*k*), a decree of a court of equity, yet he shall be protected and indemnified [271] in paying due obedience to such decree, and all legal proceedings against him shall be stayed by injunction (*l*).

(*d*) 2 Bac. Abr. 83. in note. Littleton v. Hibbins, Cro. Eliz. 793. vid. Harman v. Harman, 3 Mod. 115. 11 Vin. Abr. 274, 291.

(*e*) 11 Vin. Abr. 294. Herbert's case, 3 P. Wms. 147. Off. Ex. 139.

(*f*) Littleton v. Hibbins, Cro. Eliz. 793.

(*g*) 11 Vin. Abr. 301. 3 Bac. Abr. 81. Shafto v. Powel, 3 Lev. 355. Astley v. Powis, 1 Vez. 496. Bligh v. Earl of Darnley, 2 P. Wms. 621. 3 P. Wms. 401. note (F). Morris v. Bank of England, Ca. Temp. Talb. 217. Peploe v. Swinburn, Bunb. 48. 4 Bro. P. C. 287. See also 2 Fonbl. 412. note (s).

(*h*) 2 Fonbl. 156. note (n). Sorrell v. Carpenter, 2 P. Wms. 482. Garth v. Ward, 2 Atk. 174. Worsley v. Earl of Scarborough, 3 Atk. 392. Walker v. Smallwood, Ambl. 676.

(*i*) 3 Bac. Abr. 81. Buccle v. Atleo, 2 Vern. 37. Searle v. Lane, 88. Sorrell v. Carpenter, 2 P. Wms. 483.

(*k*) 11 Vin. Abr. 291. Stasby v. Powell, Freem. 333, 334.

(*l*) 3 P. Wms. 41. note (F). Harding v. Edge, 1 Vern. 143. Morrice v. Bank of England, Ca. Temp. Talb. 217. 4 Bro. P. C. 287. Martin v. Martin, 1 Vez. 214.

(1) 11 Serg. & Rawle, 255. But a decree of the Orphan's Court confirming the settlement of an administration account, from which a balance appears to be in the hands of an executor, does not possess the character of a judgment or decree in equity, so as to entitle the person to whom the balance is due, to come in as a judgment creditor for such balance, in the distribution of the estate of such executor, he having died after the decree, and the assets in the hands of his administrator being deficient. *Shaw v. McCameron, Adm.* 11 Serg. & Rawle, 252.

(2) See, however, *Wattlington v. Howley*, 1 Desaus. Rep. 170.

(3) *Murray v. Ballou*, 1 Johns. Cha. Rep. 566. *Murray v. Finster*, *Heathly v. Finster*, 2 Johns. Cha. Rep. 155. 158. *Edmunds v. Crenshaw et al.* 1 McCord's Cha. Rep. 252. *Walker v. Butz*, 1 Yeates, 574.

But if the decree be not conclusive of the matters in question, as if it be merely to account, and do not ascertain the sum to be paid, it is analogous to a judgment *quod computet* at law; and that is no complete judgment till the account be stated. Therefore it has been holden, that, pending a bill in equity, and after such decree, an executor may pay any other debt of a higher or an equal nature, in case the assets be legal, although he has no power of so doing as against a final decree (*m*).

Next in rank to judgments are recognizances and statutes (*n*).

A recognizance is an obligation of record; it may be entered in to by the party before a court of record, or magistrate duly authorised, conditioned for the performance of a particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. A recognizance is in most respects like another bond. The chief distinction between them is, that the latter is the creation of a new [272] debt, or an obligation *de novo*; the former is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king, the plaintiff, or C. D., is called the cognizee, as he that enters into the recognizance is called the cognizor. This instrument being either certified to, or taken by the officer of some court, is authenticated only by the record of such court, and not by the party's seal (*o*).

Of securities by statute there are three species; statutes merchant, statutes staple, and recognizances in the nature of statutes staple; and though they are fallen into disuse, yet as they are frequently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them (*p*). In order to form a distinct notion of their nature, we must recur to different acts of parliament.

By stat. 13 E. 1. called the statute *de mercatoribus*, a merchant is empowered to cause his debtor to appear before the mayor of London, or before some chief warden of a city, or of any other town which the king shall appoint, or before other sufficient men [273] chosen and sworn thereto, when the mayor or chief warden cannot attend, or before one of the clerks, to be appointed by the king, and acknowledge the debt, and the day of payment. And the recognizance, that is such acknowledgment, shall be duly entered by a clerk on a double roll, of which one part shall remain with the mayor or chief warden, and the other be deposited with the clerks, one of whom, with his own hand, shall write an obligation,

(*m*) *Smith v. Haskins*, 3 Atk. 385.
Worsley v. Earl of Scarbro', 3 Atk. 392.
Mason v. Williams, 2 Salk. 507. 11
 Vin. Abr. 297. 3 Bac. Abr. 83.
 (*n*) Off. Ex. 140. 2 Blac. Com. 311.
 Com. Dig. Admon. C. 2. *Philips v. Ech-*

ard, Cro. Jac. 8. 35.

(*o*) 2 Bl. Com. 341.

(*p*) Vid. 2 Bl. Com. 160. 2 Reeve's
 Hist. Eng. L. 160. 393. 4 Reeve's Hist.
 Eng. L. 253, 254. Sull. Lect. 155, 156.

to which writing the seal of the debtor shall be affixed, with the king's seal provided for that purpose; which seal shall be of two pieces, of which the greater piece shall remain in the custody of the mayor or the chief warden, and the other piece in the keeping of such clerk; and, if the debtor do not pay at the day limited, the merchant shall again appear before the mayor and clerk with his obligation; and if it be found by the roll or writing, that the debt was acknowledged, and the day of payment expired, then the statute prescribes certain steps to be taken for the recovery of the debt. This obligation is called the statute merchant.

In regard to the kind of statutes secondly above mentioned, the staple, that is to say, the grand mart for the principal commodities and manufactures of England, was by the stat. 27 *E.* 3. held in certain trading towns. And in order that contracts made within the same might be more effectually enforced, that act directs a course similar to a statute merchant, and enacts, that every mayor [274] of the staple shall have power to take recognizances of debts arising on such contracts, in the presence of the constables of the staple, or of one of them; and, that in every staple there shall be a seal remaining in the custody of the mayor, under the seals of the constables; and all obligations which shall be made on such recognizances shall be sealed with that seal. Such obligation is denominated a statute staple.

The benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the stat. 23 *H.* 8. *c.* 6. by which it is enacted, that the chief justice of the king's bench, and the chief justice of the common pleas, and in their absence out of term, the mayor of the staple of Westminster, and the recorder of the city of London, jointly, shall have full power and authority to take recognizances or acknowledgments of the king's subjects for the payment of debts according to a form specified; and that every obligation so acknowledged shall be sealed with the seal of the cognizor, and also with such seal as the king shall appoint for the same, and with the seal of one of such justices, and be subscribed by him, or with the seals of such mayor and recorder, with their names subscribed. The statute then directs, that such recognizance shall be duly enrolled in a manner similar to the statute merchant, and provides, that in default of payment of the debt contained in such obligation, the cognizee shall have the same advantages in every respect as in the case of an obligation by statute staple. The obligation pursu- [275] ant to this act is styled a recognizance in the nature of a statute staple.

Such are the three species of statutes.

Although recognizances are entered on the rolls of the king's courts, while statutes are consigned to the custody of the party, and hence are called pocket records (*q*), yet both species of securities having been entered into voluntarily and privately, are regard-

ed as equal in their nature, and payable in the same order (*r*). Nor is it material in regard to payment by the executor, which of them are prior or subsequent in point of date. Therefore, where there are many cognizees, he may prefer a subsequent to a prior statute or recognizance, for they all equally affect the personal estate; although, as to lands, the first in point of time shall have the preference (*s*).

If the statute or recognizance be defeasanced for the payment of a sum of money at a day certain, although the day be not arrived, yet it is a debt of the same class with other statutes; for it is a present and immediate duty to be discharged at a future period (*t*). So, where a testator acknowledged a recognizance in the nature of [276] a statute staple, of which the defeasance, after reciting that the testator and cognizee as his surety were bound in an obligation to J. S. for the debt of the testator, with a condition for a payment of one hundred pounds at a future day, provided that, if the testator, his executors, or assigns should pay the one hundred pounds to J. S. at the day, the statute should be void; it was held, that although the day of payment were not yet come, and it were a collateral sum to be paid to a stranger to the statute, and not to the cognizee, and therefore no duty to him, and although the heir of the testator might possibly pay the money at the day, yet inasmuch as the statute was for the payment of a certain sum of money, with which by intendment the executor would be charged, he might, although before the day of payment, plead the statute in bar to an action of debt on a bond (*u*). But if the testator in his lifetime enter into a statute for performance of covenants, and none of them are broken, to an action of debt on specialty the executor cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow him to elude a just debt on a contingency which may never happen (*v*). So if it be for payment of money when an infant shall come of age, it shall be no bar to other debts, for the infant may die before that time (*w*).

[277] If a statute be joint and several, the cognizee may elect to sue either the surviving cognizor, or the executor of him who is dead, or both in separate actions. If it be joint only, the survivor alone is liable (*x*).

The remedy on the statute is more expeditious than on a recognizance; since execution may be taken out on a statute without a *scire facias*, or other suit. But in case of a recognizance, if a year pass after the acknowledgment, no execution can be sued out against the party without a *scire facias*; and, in case of his death, al-

(*r*) Off. Ex. 140.

(*s*) Off. Ex. 140. 3 Bac. Abr. 81. Roll. Abr. 925. Com. Dig. Admon. C. 2 Swinb. p. 6. s. 16.

(*t*) 11 Vin. Abr. 286. 1 Roll. Rep. 495. Vaugh. 104.

(*u*) 11 Vin. Abr. 286. Goldsmith

v. Sydnor, Cro. Car. 362.

(*v*) 3 Bac. Abr. 81. 5 Co. 28. Swinb. p. 6. s. 16.

(*w*) Roll. Abr. 925.

(*x*) 11 Vin. Abr. 288. Rogers v. Danvers, 1 Mol. 165.

though a year be not elapsed, yet a *scire facias* must be sued out against his executor (*y*).

If a *scire facias* be sued out on a recognizance, an executor shall not defeat it by a voluntary payment of a debt by statute : but if, before judgment on the *scire facias*, execution be sued out against him on the statute, it shall prevail (*z*).

A recognizance not enrolled shall be considered as a bond, and payable accordingly (*a*), the sealing and acknowledgment of it supplying the want of a delivery.

So a statute not regularly taken may be good as an obligation (*b*).

[278] Nor are other inferior debts of record to be forgotten ; as issues forfeited ; fines imposed by the judges at Westminster, or at the assizes ; by the justices at quarter sessions ; by commissioners of sewers, or of bankrupts, or by stewards of leets, and the like ; for all these are debts of record, and so payable by the executor (*c*). Of all of which, as well as those by recognizance or statute, he is bound to take notice at his peril (*d*).

SECT. III.

Of debts by specialty, and herein of rent :—of debts by simple contract.

THE class of debts next in succession are debts by special contracts ; as for rent, and also on bonds, covenants, and other instruments under the seal of the party.

Although, in regard to rent, the lessor has a remedy often more efficacious in his own hands by distraining ; yet, between a debt by obligation, and a debt by covenant for a sum certain, or for damages on a breach of covenant, and a debt for rent, there is no distinction of rank : they are all debts of the same degree (*a*). Nor [279] does it make any difference whether the rent be reserved by lease in writing, or by parol : for in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty. Nor is the nature of the debt changed by the determination of the lease : the contract remains in the realty, although the right of distress be gone (*b*).

(*y*) Off. Ex. 140.

(*z*) Off. Ex. 140. in note. 11 Vin. Abr. 299. 2 Anderson, 157. pl. 87.

(*a*) Bothomly v. Lord Fairfax, 1 P. Wms. 334. 2 Vern. 750. S. C.

(*b*) Cro. Eliz. Hollingworth v. Ascue, 355. 461. 544. 2 Roll. Abr. 149.

(*c*) 11 Vin. Abr. 278. Off. Ex. 118.

(*d*) Bothomly v. Lord Fairfax. Vid. 2 Vern. 750.

(*a*) Off. Ex. 146. 2 Bl. Com. 465.

511. Com. Dig. Admon. C. 2. Plumer v. Marchant, 3 Burr. 1384. See also Gage v. Acton, 1 Salk. 326.

(*b*) 3 Bac. Abr. 82. 96. Newport v. Godfrey, 3 Lev. 267. S. C. 2 Vent. 184. Gage v. Acton, Com. Rep. 67. Stonehouse v. Ilford, 145. Godfrey v. Newport, Comb. 183. 11 Vin. Abr. 289. in note. Vid. 3 Bl. Com. 11 Stat. 8 Ann. c. 14.

But it is necessary to consider rent as distinguished into such as hath been left in arrear by the testator, and such as hath accrued due subsequently to his death.

For rent, which was in arrear in the testator's lifetime, the executor is liable merely in that character; as the testator's debt, he can be sued for it in the *detinet* only, and to such action may plead that he has fully administered (*c*): whereas, for the subsequent rent, the executor is in general regarded as personally responsible. He has no right, as we have already seen (*d*), to waive the term, for he must renounce the executorship *in toto*, or not at all; and if he entered on the demised premises, as by his office he is bound to do, the lessor may charge him as assignee in the *debet* and *detinet* for the rent incurred subsequently to his entry (*e*).

If the profits of the land exceed the amount of the rent, as the [280] law *prima facie* supposes, such of the profits as are sufficient to make up the rent shall be appropriated to the payment of the lessor, and cannot be applied to any other purpose. Therefore, if in such case the lessor bring an action against the executor for the rent, he cannot plead *plene administravit*, for that plea would confess a misapplication of the profits; since no other payment out of them can be justified till the rent be answered (*f*). On the other hand, the profits of the land may be inadequate to the rent. In a variety of cases, they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial. As in respect to rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as in the case of a lease of tithes, or of meadow grounds, which are usually flooded in the winter (*g*). So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent (*h*). In these and the like instances the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* [281] and *detinet*, he must disclose the matter by special pleading, and pray judgment whether he shall be charged, otherwise than in the *detinet* only, for more than the actual profits (*i*).

Thus the profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund should prove insufficient, the residue of the rent is payable out of

(*c*) Lyddall v. Dunlapp, 1 Wills. 4.
Com. Dig. Admon. B. 14.

(*d*) Supr. 143.

(*e*) Billingham v. Speer, 1 Salk. 297. 317. Off. Ex. 147.

(*f*) Buckley v. Pirk, 1 Salk. 317.

(*g*) Off. Ex. 149.

(*h*) Ibid.

(*i*) Buckley v. Pirk, 1 Salk. 317.

the general assets, and stands on the same footing with other debts by specialty.

Debts by bond, and other instruments under the seal of the party, are of the same class with debts for rent (*k*); and an executor is bound to pay a debt on specialty before a debt by simple contract. But in the distribution of separate property of a married woman as assets after her death, a bond debt is not entitled to priority, for the bond merely as a bond is void (*l*). If an agreement be entered into under hand and seal for the purchase of an estate, although the estate on the purchaser's death descend to his heir free from all debts by simple contract, and the personal assets be not more than adequate to pay for the estate, the vendor being a candidate by specialty, may at law charge the purchaser's executor on the covenant to the disappointment of all the simple contract creditors (*m*), though equity will marshal the assets in their favour (*n*). An executor is also bound to pay a debt on specialty before a debt by simple contract, although the bond be not yet due. For the obligation is a present duty, and the condition is but a defeasance of it (*o*). Hence it hath been adjudged, that if an action be brought against an executor on a simple contract of the testator, he may plead that his testator entered into a bond payable at a future day, and it shall cover assets to the amount of the sum payable by the condition (*p*). But if the testator die indebted to A. in one specialty, and to B. in another, and of A.'s debt the day of payment is past, and of B.'s debt the day of payment is to come, the executor has no right to pay B. in preference [282] to A. : yet if A. forbear to demand or sue for his debt, till the debt of B. become payable, then it is in the election of the executor to pay which of them he thinks proper (*q*). By the custom of London, if a citizen of London die indebted to another citizen by simple contract made within the city, such debt is equal to a debt by specialty, and the payment of it by the executor shall be binding on the obligor of a bond, though a stranger and no citizen (*r*).

In the administration of assets, a contingent security, as for example a bond to save harmless, shall not stand in the way of a debt by simple contract (*s*). And if, subsequently to the payment of the simple contract debt, the contingency should happen, it seems reasonable that evidence of such payment should be admitted on

(*k*) Off. Ex. 146.

(*l*) Anon. 18 Ves. 258.

(*m*) See *Brome v. Monck*, 10 Ves. jun. 620, 621.

(*n*) Vid. *supr.* 417.

(*o*) 11 Vin. Abr. 304. Leon. 187.

(*p*) 3 Bac. Abr. 81. *Buckland v. Brook*, Cro. Eliz. 315. *Lemun v. Tooke*, 3 Lev. 57. *Goldsmith v. Sydnar*, Cro. Car. 362. *Bank of England v. Morrice*,

Ca. Temp. Hard. 228.

(*q*) Off. Ex. 143. Com. Dig. Admon. C. 2. Swinb. p. 6. s. 16.

(*r*) 3 Bac. Abr. 82. *Snelling v. Norton*, Cro. Eliz. 409. Noy 53. Roll. Abr. 557. 5 Co. 82 b. 83. *Scudamore v. Hearne*, Andrew's Rep. 340.

(*s*) 11 Vin. Abr. 395. *Lancy v. Fairechild*, 2 Vern. 101. *Hawkins v. Day*, Amb. 160.

the executor's plea of *plene administravit* to an action by the specialty creditor(s).

But where the contingency has taken place, although the debt consequent upon it has not yet been paid, it may be pleaded to an action by a simple contract creditor: as, where the testator had executed a bond to A. in two thousand eight hundred pounds, conditioned to indemnify him against another bond for eight hundred [283] pounds, which he had executed jointly with the testator to B. for the debt of the testator, in whose lifetime the eight hundred pounds had become due, and were still unpaid; on the executrix's disclosing these facts in a plea to an action of *assumpsit*, and stating that she had administered all, except so much as would satisfy such indemnity bond, it was held to be a sufficient defence (*t*).

A bond merely voluntary shall be postponed to simple contract debts which are *bona fide* owing; but such bond, if not to the prejudice of creditors, must be paid by the executor, and in preference to legacies. For a bond, however voluntary, transfers a right in the lifetime of the obligor; whereas legacies arise from the will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his lifetime (*u*). But an executor has no authority to pay a bond founded on an usurious contract, or a bond *ex turpi causâ*. Such payment will amount to a *devastavit*, as well against legatees as against creditors (*v*).

If there be a joint and several obligation, an executor of a deceased obligor may pay the debt out of the estate of the testator, [284] and plead it to other actions by creditors or specialties. But if the obligation be joint only, there the survivor must be charged out of his own estate, and the executors of the deceased obligor are not liable on the instrument (*w*).

A demand arising from a covenant, as I have before observed, is of the same nature, whether it be for a specific sum, or whether it sound merely in damages(*x*). (1) Thus the grantor's covenant in a marriage settlement for him and his heirs, that the premises are free from incumbrances, shall rank equally with debts on bond(*y*). So, to an action on simple contract against an executor,

(s) 11 Vin. Abr. 307. Allen, 40. Sed vid. Goldsb. 142.

(t) Cox v. Joseph, 5 Term. Rep. 307.

(u) 11 Vin. Abr. 304, 305. 1 Eq. Ca. Abr. 84. 143. 3 Bac. Abr. 81, 82. Cray v. Rooke, Ca. Temp. Talb. 156. Loeffis v. Lewen, Prec. Ch. 370. Croft v. Pyke, 3 P. Wms. 182. Lechmere v. Earl of Carlisle, ibid. 222. Lady Cox's case, ibid. 339. Lassels v. Lord Cornwallis, Finch. Rep. 232.

(v) 11 Vin. Abr. 307. Brownl. 33. Winchcombe v. Bishop of Winchester, Hob. 167. Robinson v. Gee, 1 Ves. 254.

(w) 11 Vin. Abr. 288. Rogers v. Danvers, 1 Mod. 165. S. C. Freem. Rep. 127.

(x) Plumer v. Marchant, 3 Burr. 1380. Freemoult v. Dedire, 1 P. Wms. 429.

(y) 3 Bac. Abr. 81. 11 Vin. Abr. 292.

(1) *Frazer v. Tunis*, 1 Binn. 254.

he may plead that the testator entered into certain covenants, and may shew the breach of them, and state the amount of the damages incurred, and that he has not assets more than to satisfy them : the plea will be good, although the damages are not liquidated (*z*). But where the husband by marriage articles having agreed to settle one thousand five hundred pounds *per annum* on the issue, made a deficient settlement, and devised all his unsettled estates for payment of debts, it was adjudged in equity, that as the settlement was of less than the stipulated value, the widow and infant were to be compensated in damages ; but that as the articles made no mention [285] of any specific land, nor contained any covenant in regard to its value, they were to come in after creditors by bond (*a*).

If A. covenant to pay a sum of money, and die before payment, it may be recovered against his executors (*b*) : whereas it has been held, that if he covenant that his executors shall pay the money, no action can be maintained against them, on the principle that it could not be a debt of the testator (*c*) ; but this latter case is of very doubtful authority, for there also the testator was himself bound, and the lien falls upon his representatives, though he himself could not have been sued ; and it seems that on either covenant they are equally responsible (*d*).

Of this class also are debts by mortgage, and although there be neither bond nor covenant for the payment of the mortgage money, yet it is payable out of the personal assets (*e*). (1) But if such debt be paid out of those assets, the other creditors, as well by specialty as on simple contract, and even legatees, are, in case of a deficiency of that fund, entitled in equity to the advantage of the mortgage, to the extent of what was applied in discharge of it out of the personal estate (*f*).

[286] Last in the order of payment are debts on simple contract ; as on bills and notes not under seal, and verbal promises (*g*), or such as are implied in law : thus where A. received with an apprentice the sum of two hundred and fifty pounds, and died about two years afterwards, having employed the apprentice, during that period, in inferior affairs, the executors were decreed in equity, after payment of the debts by specialty, to repay the money as a debt due by simple contract, deducting at the rate of twenty pounds

(*z*) 11 Vin. Abr. 305. *Smith v. Harman*, 6 Mod. 144.

(*a*) 11 Vin. Abr. 290. 305. *Whitchurch v. Bayntan*, 2 Vern. 272.

(*b*) *Perrot v. Austin*, Cro. Eliz. 232. *Sheph. Epit.* 990.

(*c*) 11 Vin. Abr. 276. *Perrot v. Austin*, Cro. Eliz. 232. *vid. Co. Litt.* 386.

(*d*) *Id.* 3 Burr. 183, 1384.

(*e*) *Vid. Bristol v. Hungerford*, 2

Vern. 524. *Powel on Mortgages*, 813. *Howell v. Price*, 1 P. Wms. 291. 294. *King v. King*, 3 P. Wms. 358.

(*f*) *Com. Dig. Chancery*, 2 G. 4. *Fletcher v. Stone*, 3 Vern. 273. *Wilson v. Fielding*, *ib.* 763. S. C. 10 Mod. 426. *Cope v. Cope*, Salk. 449. and *vid. infr.*

(*g*) 2 Bl. Com. 465, 466. 511. *Off. Ex.* 155.

a-year for the maintenance of the apprentice during the time he lived with his master (*h*). On contracts of this nature, debts due to the king shall, it seems, be satisfied before debts which are due to subjects (*i*); the wages also of domestic servants and of labourers appear, with great reason, entitled to a preference; but, with the exception of these, the executor has a right likewise, in this species of debts, to prefer in payment whichever he pleases (*k*).

But where the testator, though in no respect indebted to his brother, had signed a note by which he acknowledged himself indebted to his brother in 5000*l.*, and always kept the note in his own custody, and the brother knew nothing of it at the time it was signed, and at the testator's death it was found among his papers, it was held to be a matter merely initiate or intended, and never perfected, and consequently as no debt at all (*l*).

With regard to the interest of debts: on a judgment subsequent interest cannot be claimed, but it may be recovered in an action on the judgment (*m*). Debts by specialty are payable with interest (*n*). (1) And it has been held, that even on demands arising from covenant, although not liquidated, and sounding only in damages, interest is allowed (*o*). But interest cannot be recovered on a bond beyond its penalty (*p*). Yet to that extent it may be recovered, although not expressly reserved (*q*). In respect to interest on simple contract debts, the holder of a bill of exchange or of a promissory note is entitled to recover the money payable upon it with interest (*r*) in some cases from the date of the bill or note (*s*); but in general from the time at which it ought to have been regularly paid down to the time when the plaintiff will be entitled to final judgment (*t*), and all incidental expences occasioned by non-acceptance, or non-payment (*u*). Thus, on a bill or note payable on presentment, interest may be computed from the presentment (*v*). And in regard to all other debts of this species, it is the constant practice, either on the contract, or in damages, to

(*h*) *Soan v. Bowden & Eyles*. M. 30 Car. 2. Ch. Ca. Temp. Finch. 396. 1 Burn. Just. 85.

(*i*) 3 Bac. Abr. 80. in note.

(*k*) 2 Bl. Com. 511. 1 Roll. Abr. 927. 11 Vin. Abr. 274. in note. *Shep. Epit.* 986. *Shep. Touchst.* 478.

(*l*) *Disher v. Disher*, 1 P. Wms. 204.

(*m*) *Creuze v. Hunter*, 2 Ves. jun. 162, 165.

(*n*) Com. Dig. Chancery, 3 S. 1.

(*o*) 14 Vin. Abr. Interest, C. 2. Fonbl. 424. Sed vid. *Sweetland v. Squire*, 2 Salk. 623.

(*p*) *Creuze v. Hunter*, 2 Ves. jun. 168. *Sharpe v. Earl of Scarbro'*, 3 Ves. jun. 557. *Knight v. Maclean*, 3

Bro. Ch. Rep. 496. *Grosvenor v. Cook*, Dig. Rep. 305. Sed vid. *Lord Lonsdale v. Church*, 2 Term Rep. 388.

(*q*) *Tidd's Prac. B. R.* 484, 485. *Farquhar v. Morris*, 7 Term Rep. 124. But see 1 Bos. & Pul. 337.

(*r*) *Bailey on Bills of Exch.* 90, 91. *Blaney v. Hendricks*, Bl. Rep. 761. Vid. also *Bun.* 119. *Auriol v. Thomas*, 2 Term Rep. 52.

(*s*) *Bailey on Bills of Exch.* 91.

(*t*) *Robinson v. Bland*, Burr. Rep. 1077.

(*u*) *Bailey on Bills of Exch.* 91. *Auriol v. Thomas*, 2 Term Rep. 52.

(*v*) *Blaney v. Hendricks*, Bl. Rep. 761.

give interest for the detention (*w*). Book debts, indeed, form an exception to this rule: By the common law they do not of course carry interest, but even on them it may be payable in consequence [288] of the usage of particular branches of trade, or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it (*x*).

If the testator by the will direct that all his debts shall be paid, or make any provision for the payment of his debts in general, this shall revive a debt barred by the statute of limitations, and render it payable by the executor with the others (*y*).

The principle here laid down must not now be considered as the law, as in a late case *Sir Thomas Plumer, V. C.*, in an elaborate judgment, after considering all the authorities, decided, that a devise in trust for payment of debts, did not revive a debt, upon which the statute of limitations had taken effect, by the expiration of the time before the testator's death (*z*). (1)

SECT. IV.

Of a creditor's gaining priority by legal or equitable process.
—*Of notice to an executor of debts by specialty, or simple contract.*

SUCH is the order which the law prescribes to an executor for the payment of debts; and although he has a right to pay one creditor in preference to another of the same degree, yet this election may be controlled by legal or equitable proceedings against him, of which he has due notice (*a*). Thus, if an action be properly commenced against an executor for any specific debt, it must be preferred by him in payment to others of the same class. Nor, in [289] that case, shall he be warranted in making any voluntary payment of such other debts, to defeat the party of his remedy (*b*).

Yet although one creditor commence an action, if another creditor in equal degree commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor has it in his election to give a preference by confessing judgment in

(*w*) *Craven v. Tickel*, 1 Ves. jun. 63.

(*x*) *Eddowes v. Hopkins*, Dougl. 361.

(*y*) *Andrews v. Brown*, Prec. Ch. 385. *Blakeway v. Earl of Strafford*, 2 P. Wms. 373.

(*z*) *Burke v. Jones*, 2 Vez. & Bea. 275.

(*a*) Off. Ex. 145.

(*b*) 11 Vin. Abr. 296. in note. *Good-fellow v. Burchett*, 2 Vern. 300. 2 Fonbl. 412. Com. Dig. Admon. C. 2. 3 Bac. Abr. 83. *Parker v. Dec*, 2 Chan. Ca. 201. *Solley v. Gower*, 2 Vern. 62. Off. Ex. 143. 146. 2 Bl. Com. 512.

(1) *Roosevelt v. Mark*, 6 Johns. Cha. Rep. 266. *Brown's Adm. v. Griffith*, 6 Munf. 450. *Smith v. Porter*, 1 Binn. 209. *Campbell's Ex. v. Sullivan*, Hard. Rep. 17. *Chandler's Ex. v. Neal's Ex.* 2 Hen. & Munf. 124. See *Lewis's Ex. v. Bacon's Legatees*, 3 Hen. & Munf. 89. *Anonymous*, 1 Hayw. 243.

the action of the one, and pleading such judgment to the action of the other (c). But if, for the purpose of favouring the claim of one plaintiff in prejudice to that of another, he plead a matter which he knows to be false, the plea shall not be available, as it shall be if the falsity exist not in his own knowledge, as if he plead *non est factum testatoris* (d).

And even after an interlocutory judgment, and before the execution of a writ of inquiry of damages, he may confess a judgment in an action for a debt in equal degree (e); for he is in no case bound against his will to defend a suit, and expend the assets in costs, where the case is clear (f).

According to several adjudged cases (g), the filing of a bill in [290] equity shall equally prevent the alienation of assets as the filing of an original at law. And, therefore, if a suit in chancery be instituted by a creditor against an executor, he cannot justify a voluntary payment of another creditor of the same order. But a decision to that effect was reversed in the House of Lords, principally on the ground, that a decree cannot be pleaded at law to an action brought against an executor on another debt of equal rank. However, it is now settled, that though a decree in equity cannot be pleaded at law, it is equivalent, in the administration of assets, to a judgment; and, therefore, that if a decree have a real priority in point of time, not by fiction and relation to the first day of term, it shall be preferred, in the order of payment, to subsequent judgments; and the executor, as we have seen, shall be protected in his obedience to such decree, and all proceedings against him at law stayed by injunction (h). So, pending a suit in equity by one creditor, an executor may confess a judgment at law in favour of another creditor of the same degree (i). Or after a suit instituted by a creditor for an account, pay any other creditor in preference, and he will be allowed such payment in passing his accounts (k).

He may also confess a judgment after a decree *quòd computet*, if before a final decree. Such decree *quòd computet*, is analogous to an interlocutory judgment at law; it does not pass in *rem judi-* [291] *catam* until the final decree (l).

Nor will equity interpose, where, after an action brought by one

(c) Off. Ex. 145. 11 Vin. Abr. 296. in note 302. Palmer v. Lawson, 1 Lev. 200. Waring v. Danvers, 1 P. Wms. 295. Mellor v. Overton, Carter, 228. Goodfellow v. Burchett, 2 Vern. 300. Swinb. p. 6. s. 16. 2 Fonbl. 411, 412. Holbird v. Anderson, 5 Term Rep. 238, 239.

(d) 11 Vin. Abr. 296. Parker v. Dee, 2 Chan. Ca. 201. Jolly v. Gower, 2 Vern. 62.

(e) Smith v. Haskins, 2 Atk. 386.

(f) Off. Ex. 145.

(g) 2 Fonbl. 412. note S. Joseph v. Mott, Prec. Chan. 79. Darston v. Earl

of Orford, ib. 188. Wright v. Woodward, 1 Vern. 369. 3 Bac. Abr. 81.

(h) Peploe v. Swinburn, Bunb. 48. Darston v. Earl of Orford, 3 P. Wms. 401. note F. Forrest, 217. Harding v. Edge, 1 Vern. 143. 2 Vern. Buccle v. Atleo, 37. Searle v. Lane, 88. Morrice v. Bank of England, Ca. Temp. Talb. 217. 4 Bro. P. C. 287.

(i) Waring v. Danvers, 1 P. Wms. 205. Ca. Temp. Talb. 225.

(k) Maltby v. Russell, 2 Sim. & Stu. 227.

(l) Smith v. Eyles, 2 Atk. 385. Ca. Temp. Talb. 217.

creditor, an executor confesses judgment to another creditor in equal degree (*l*); even although the judgment be given on a *quantum meruit*, without a writ of inquiry to ascertain the damages, if they be so laid in the declaration as not to exceed the debt which is really due (*m*). Nor, where a creditor sues an executor at law and in equity at the same time for the same demand, will equity compel him to make his election in which of the courts he will proceed, in case the executor be attempting to prefer other creditors before him by confessing judgments to them, but will merely restrain him from taking out execution on the judgment without leave of the court (*n*). Nor will a mere demand by the creditor divest the executor of his right of giving such preference; that effect can be produced only by the process of a court of justice (*o*). Thus the executor is invested with large discretionary powers of preferring one creditor to another of the same class, and in certain cases he may avail himself of the privilege with great propriety, and on solid reasons (*p*). But, in general, on a deficiency of assets, it were [292] a more honourable and conscientious discharge of his duty, as far as he has the power of deciding, to pay debts of equal degree in equal proportions (*q*).

Nor is an executor warranted merely in the payment of one debt before another of the same order; he may also pay a debt of an inferior nature before one of a superior, of which he has no notice (*r*), provided a reasonable time has elapsed after the testator's death; for such payment, if precipitate, would be evidence of fraud.

Of debts of record, supposing, in the case of judgments, they are docketed, it has been already stated, an executor is bound to take cognizance, as well as of a decree in equity: constructive notice in respect to them is sufficient (*s*); but of other species of debts there must be actual notice.

It has been asserted, that such notice must be by suit (*t*); but it is perfectly clear, that an executor, if he be by any means apprized of a debt of a higher degree, would not be justified in exhausting the assets in the discharge of one which is inferior; yet unless he had some notice of the former, he incurs no risk by the payment, [293] after a competent time, of the latter. Hence it has been held, that an executor may plead a judgment recovered against him on a simple contract to an action of debt on a specialty, if he had no notice of such specialty (*u*); and may even voluntarily pay,

(*l*) 3 Bac. Abr. 83. in note. Waring v. Danvers, 1 P. Wms. 295.

(*m*) 11 Vin. Abr. 298. in note. Waring v. Danvers, 1 P. Wms. 295.

(*n*) 3 Bac. Abr. 83. Barker v. Du-meres, Barnard. Ch. Ca. 277.

(*o*) Off. Ex. 145.

(*p*) 11 Vin. Abr. 270. 228. Blundivell v. Loverdell, Sid. 21. Off. Ex. 260.

(*q*) Off. Ex. 260, 261. 3 Bl. Com. 19.

(*r*) 3 Bac. Abr. 82. in note. L. of Ni. Pri. 178.

(*s*) Dyer, 32. in note. 3 Bac. Abr. 83. in note. Littleton v. Hibbins, Cr. Eliz. 793. Searle v. Lane, 2 Vern. 88, 89. Sed vid. L. of Ni. Pri. 178. Harman v. Harman, 3 Mod. 115.

(*t*) 3 Bac. Abr. 83. in note. Brook- ing v. Jennings, 1 Mod. 175. Vid. Fitzgib. 77.

(*u*) 3 Bac. Abr. 82. in note. Harman

without notice, such inferior debt in exclusion of the superior, and a very just principle; for otherwise it might be in the power of an obligee to ruin an executor by suppressing a bond until all the assets were expended in the payment of simple contract debts (*w*). And, indeed, after a suit is commenced, yet before he has notice of the plaintiff's demand, he is warranted in paying any other creditor (*x*). On the other hand, an executor is not authorised to confess a judgment for a debt of an inferior nature, if he has notice of the existence of a superior. Thus, where an executor to an action on bond pleaded a judgment confessed by him on the preceding day on a simple contract debt, the plea was disallowed, on the ground of its not averring that the defendant had no notice of the plaintiff's demand (*y*).

If, ignorant of the existence of a bond, he confess a judgment on a simple contract, and afterwards judgment be given against him on the bond, he is bound, however insufficient the assets, to [294] satisfy both the judgments, for he might have pleaded the first, if he had not had assets for both (*z*). In like manner a judgment must be satisfied, though recovered against one executor only where there are several (*a*), or recovered against one executor by the name of an administrator, or *vice versa* (*b*).

v. Harman, 2 Show. 492. S. C. 3 Mod. 115. L. of Ni. Pri. 178. Davis v. Monkhouse, Fitzg. 76. Scudamore v. Hearne, Andrew's Rep. 340.

(*w*) 3 Bac. Abr. 82. Off. Ex. 145. Britton v. Bathurst, 3 Lev. 115. Hawkins v. Day, Ambl. 162. vid. tam. Greenwood v. Brudnish, Prec. Ch. 534.

(*x*) Off. Ex. 145. Plowd. 279. Finch. L. 79. Harman v. Harman, 3 Mod. 115. L. of Ni. Pri. 178.

(*y*) Sawyer v. Mercer, 1 Term Rep. 690.

(*z*) Com. Dig. Admon. C. 2. Britton v. Bathurst, 3 Lev. 114.

(*a*) Com. Dig. Admon. C. 2. Cro. Eliz. 471. 1 Sid. 404. Parker v. Amys, 1 Lev. 261.

(*b*) Com. Dig. Admon. C. 2. Anon. Cro. Eliz. 646. Parker v. Masters, 1 Sid. 404. Sed vid. Anon. Cro. Eliz. 41.

CHAP. III.

OF AN EXECUTOR'S RIGHT TO RETAIN A DEBT DUE TO HIM FROM
THE TESTATOR—UNDER WHAT LIMITATIONS.

IF a debtor appoint his creditor (*a*) to the executorship, he is allowed, both at law and in equity, to retain his debt, in preference to all other creditors of an equal degree. This remedy arises from the mere operation of law, on the ground, that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt. And therefore he may appropriate a sufficient part of the assets in satisfaction of his own demand; otherwise he would be exposed to the greatest hardship; for, since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction; but the privilege is accompanied with this limitation, that he shall not retain his own debt as against those of a higher degree; for the law places him [296] merely in the same situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose, during the existence of those of a superior order (*b*). As where A., before his marriage, covenanted with B. and C. to leave them by his will, or that his executors within six months after his death should pay them seven hundred pounds, in trust to pay the interest to his wife for life, and, on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance; on his dying before his wife, without issue and intestate, it was held, that B., in the character of administrator, might retain assets to that amount during the life of the widow, against a bond creditor, who sued before the six months were elapsed (*c*).

So, if A. and B. be jointly and severally bound in an obligation, and A. appoint the executrix of the obligee his executrix, and

(*a*) Supr. 239. *Thynn v. Thynn*, 1 Abr. 922, 923. Plowd. 185. 543. 11 P. Wms. 296.

(*b*) 2 Bl. Com. 511. 3 Bl. Com. 18, 19. Of Ex. 32. 142, 143. Com. Dig. Admon. C. 2. 3 Bac. Abr. 10. 83. Roll.

Vin. Abr. 72. 261. Winch. 19. Harg.

Co. Litt. 264. note 1. Vid. *infr.*

(*c*) *Plumer v. Marchant*, 3 Burr. 1589.

die leaving assets, she is not compelled to resort to an action against B., but is entitled to retain for the debt; in case there be no assets, she has a right to pursue her remedy on the bond against [297] B. (*d*). So, if A. be indebted to B. and C. by several bonds, and die, and D. take out administration to A., and afterwards B. die, having appointed D. his executor, he may retain effects, of which he is possessed as administrator of A., to satisfy the debt due to him as the executor of B. (*e*). (1) If A. be indebted in a bond to B., and die, having appointed B. his executor, who, after having intermeddled with the goods, and before probate, also dies; although, before his death, he did not expressly elect in what particular effects he would have the property altered; yet it must be presumed that it was his intention to pay his own debt first, and therefore his executor shall have the same power of retaining as belonged to him (*f*). (2) So, for a bond executed by the testator to A. conditioned for the payment of money to B., B. it seems, in case he is executor, may retain (*g*). So, if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may retain against the rightful administrator (*h*). In short, wherever an executor might have been sued, or might have paid a debt, he has authority to retain (*i*).

But where A. and B. were joint obligors in a bond, the former as principal, the latter as surety, A. died, B. took out administration to him, and on forfeiture of the bond, discharged the debt, it [298] was held that he could not retain, for, by joining in the bond, the debt became his own (*k*). Yet, in such case, it seems he might retain for the money paid as constituting a simple contract debt.

A retainer for a debt may either be given in evidence on plea of *plene administravit*, or it may be pleaded specially (*l*).

An executor may, as we have seen (*m*), retain both at law and in equity for his whole debt, as against other creditors of the same degree (*n*): but equity will interpose to restrain him from perverting this privilege to the purposes of fraud (*o*). Nor will a mere nomination of a creditor to the executorship, if he refuse to act,

(*d*) Com. Dig. Admon. C. 1. Fryer v. Gildridge, Hob. 10. 3 Bac. Abr. 10. 3 Kebl. Rep. 166. Cock v. Cross, 2 Lev. 73.

(*e*) 11 Vin. Abr. 261. 2 Brownl. 50.

(*f*) 11 Vin. Abr. 563. Croft v. Pyke, 3 P. Wms. 183, 184. and note B.

(*g*) Com. Dig. Admon. C. 2. Semb. Raym. 484.

(*h*) 11 Vin. Abr. 265. Blackborough v. Davis, 1 Salk. 38.

(*i*) Com. Dig. Admon. C. 2. Plumer

v. Marchant, 3 Burr. 1384.

(*k*) 11 Vin. Abr. 262. Godb. 149.

(*l*) Loane v. Casey, Bl. Rep. 965. Plumer v. Marchant, 3 Burr. 1383. 11

Vin. Abr. 266. 1 Brownl. 75.

(*m*) Supr. 295.

(*n*) 11 Vin. Abr. 265, in note. Waring v. Danvers, 1 P. Wms. 295. Musson v. May, 3 Ves. & Bea. 194.

(*o*) 3 Bac. Abr. 83. in note. Cock v. Goodfellow, 10 Mod. 496.

(1) *Thomas v. Thompson*, 2 Johns. Rep. 471.

(2) *Griffith v. Chew's Ex.* 8 Serg. & Rawle, 29.

extinguish his legal remedy for the recovery of his debt (*p*). Hence if a creditor be appointed executor with others, he may sue them, especially if he hath not administered (*q*). If there be not personal assets, he may sue the heir, where the heir is bound (*r*).

(*p*) Rawlinson v. Shaw, 3 Term Rep. 557.
(*q*) 3 Bac. Abr. 10, in note. Off. Ex. 33.
(*r*) Harg. Co. Litt. 264 b. note 1. Wankford v. Wankford, Salk. 304. Off. Ex. 33, 34.

CHAP. IV.

OF THE PAYMENT OF LEGACIES.

SECT. I.

Legacy what—who may be legatees—who not—legacies general, and specific—lapsed, and vested.

HAVING thus discussed the duty of an executor in regard to the payment of debts according to the order described by law, the payment of legacies, in the next place, demands his attention.

A legacy is a bequest, or gift of personal property by will.

All persons are capable of being legatees, with some special exceptions by common law, and by statute (*a*).

To this disability all traitors are subject (*b*). By stats. 25 *Car.* 2. c. 2. and 1 *Geo.* 1. stat. 2. c. 13. persons required to take the oaths [300] and otherwise qualify themselves for offices, and omitting to do so, shall be incapable of a legacy. By stat. 9 & 10 *Wm.* 3. c. 32. persons denying the Trinity, or asserting that there are more gods than one, or denying the Christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be also incapable of any legacy. Likewise, by stat. 5 *Geo.* 3. c. 27. if artificers going out of the realm to exercise or teach their trades abroad, or exercising their trades in foreign parts, shall not return within six months next after due warning given them, they shall be subject to the same disqualification. And by stat. 25 *Geo.* 2. c. 6. all legacies given by will or codicil to witnesses of the same are declared void (*c*). (1) And the statute extends to wills disposing of personal property only (*d*).

Although a man cannot make a grant to his wife, nor enter into a covenant with her, (for such grant would be to suppose her sepa-

(*a*) Bl. Com. 512. 4 Burn. Eccl. L. Eccl. L. 78.
313. 4 Bac. Abr. 337.

(*b*) 2 Bl. Com. 512.

(*d*) *Lees v. Summersgill*, 17 Ves. jun. 508.

(*c*) Vid. 2 Bl. Com. 377. and 4 Burn.

(1) A legacy given to a *feme covert* during her own life and that of her husband, and to the heirs of her body, but if she had none, then over, and the husband was a subscribing witness to the will, but died before it was proved, and another subscribing witness proved it, it was held that he (the husband) did not take such an interest in the legacy as would make it void under the statute, on account of his being a subscribing witness, and that the wife surviving was entitled to the legacy. *Woodbury v. Collins's Ex.* 1 Desaus. Rep. 123.

rate existence, and to covenant with her would be to covenant with himself,) yet he may bequeath any thing to her by will, since that cannot take effect till the coverture is determined by death (*d*).

An infant in *ventre sa mere* may, as we have seen, be appointed an executor. He is also capable of being a legatee (*e*). And a bequest of 2000*l.* each “to all the children of my sister I. G. whether now born or hereafter to be born,” has been held to include all children born after the testator’s death, and an inquiry was directed, what would be a proper sum to be set apart to answer the legacies to future children (*f*). And a bequest in trust for all the children of the testatrix’s nephew R., *born in the lifetime of the testatrix*, was held to include a child, of which the wife of R. was *enceinte* at the time of the testatrix’s death, although not born until several months afterwards (*g*). (1)

If a legatee is sufficiently described in a will, so that he can be identified, a mistake of his christian name will not make the legacy void : as, where a testator gave a legacy unto *my namesake Thomas, the second son of my brother John*, John had no son of the name of Thomas, but his second son’s name was William, and he was held entitled (*h*). (2) And where legacies were given “to the three children of A. the sum of 600*l.* each,” and there were four children all born before the date of the will ; the four were held intitled to 600*l.* each, for that it was a mere slip in expression, the meaning being, all children ; and the court conceiving the intention to be to give to each child so much, struck out the specified number (*i*). (3)

Under a bequest by an unmarried man “to my children,” parol evidence was allowed to shew whom the testator considered in the character of children : and his illegitimate children, having obtained a name by reputation, were admitted to take, though not named

(*d*) 1 Bl. Com. 442. Harg. Co. Lit. 112.

(*e*) Northey v. Strange, 1 P. Wms. 342. vid. Ellison v. Airey, 1 Ves. 114. Clarke v. Blake, 2 Bro. Ch. Rep. 320. and 1 Cox’s Rep. 248.

(*f*) Defflis v. Goldschmidt, 1 Mer. Rep. 417. S. C. 19 Ves. 566.

(*g*) Trower v. Butts, 1 Sim. & Stu. 181.

(*h*) Stockdale v. Bushby, Coop. Rep. 229. and 10 Ves. 381. S. C. and see Careless v. Careless, 1 Meri. Rep. 384. same principle decided, and 19 Ves. 601.

(*i*) Garvey v. Hebbert, 19 Ves. 125.

(1) So where the testator, after directing the payment of his debts and funeral expences, and giving legacies to and making provision for his wife, and giving legacies to several of his grandchildren, proceeded as follows, “I will and devise unto my grandchildren, the children of my son *Edward*, deceased, all the remainder and residue of my estate, both real and personal, whatsoever and wheresoever to be found;” it was held that a posthumous grandchild, *in ventre sa mere* at the making of the will, and death of the testator, was entitled to a grandchild’s share under the will. *Swift v. Duffield*, 5 Serg. & Rawle, 38.

(2) *Powell v. Biddle*, 2 Dall. Rep. 70. *Thomas v. Stevens*, 4 Johns. Cha. Rep. 607.

(3) *Geer et al. v. Winds*, 4 Desaus. Rep. 85.

in the will (*i*). But a bequest "to such child or children if more than one as A. may happen to be *ensient* of by me," a natural child of which she was then pregnant, cannot take (*k*).

Grandchildren in a will may be construed to mean great-grandchildren, unless the intention appears to the contrary (*l*). (1) The word "relations" in a will means "next of kin (*m*). (2) And a bequest by a testator in India "to my nearest surviving relations in my native country Ireland," was held confined to brothers and sisters, living in Ireland or elsewhere (*n*).

[301] Of legacies there are two descriptions; a general legacy, and a specific legacy (*o*). The former appellation is expressive of such as are pecuniary, or merely of quantity. Under the denomination of specific legacies two kinds of gifts are included; as, first, where a certain chattel is particularly described, and distinguished from all others of the same species; as, "I give the diamond ring presented to me by A." The second is where a chattel of a certain species is bequeathed without any designation of it as an individual chattel; as, "I give a diamond ring." A bequest in the former mode can be satisfied only by the delivery of the identical subject; and if it be not found among the testator's effects, it fails altogether, unless it be in pawn, when the executor must redeem (*p*) it for the legatee. But a bequest of the latter description may be fulfilled by the delivery of any thing of the same kind (*q*). (3) A legacy of "50*l.* for a ring" is a general pecuniary legacy (*r*).

Although the courts are averse from construing legacies to be specific (*s*), yet, if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, they shall have that operation. (4) Hence, under some

(*i*) *Beachcroft v. Beachcroft*, 1 Mad. Rep. 430. and see *Lord Woodhouselee v. Dalrymple*, 2 Meri. Rep. 419.

(*k*) *Earle v. Wilson*, 17 Ves. 528. and see *Arnold v. Preston*, 18 Ves. 288.

(*l*) *Hussey v. Berkeley*, 2 Eden's Rep. 194.

(*m*) *Pope v. Whitcombe*, 3 Meri. Rep. 689.

(*n*) *Smith v. Campbell*, 19 Ves. 400.

(*o*) 4 Bac. Abr. 337. 425. 2 Bl. Com. 512.

(*p*) *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 113. 4 Bac. Abr. 355. Swinb. part 7. s. 20.

(*q*) 2 Fonbl. 374. note O. *Purse v. Snaplin*, 1 Atk. 416. *Forrest*. 227. *Bronsdon v. Winter*, Ambl. 57.

(*r*) *Apreece v. Apreece*, 1 Ves. and Bea. 364.

(*s*) *Ellis v. Walker*, Ambl. 310.

(1) *Pemberton v. Parke*, 5 Binn. 601. And sons and daughters in a will, will extend to grandchildren to prevent their being cut off. *Smith's Case*, 2 Desaus. Rep. 123. n. But the word children will not be held to mean grandchildren, unless there be some ambiguity in the testator's will rendering it necessary, or without such construction his intent could not be satisfied. *Izard v. Izard*, 2 Desaus. Rep. 308.

(2) *M'Neilledge v. Galbraith*, 3 Serg. & Rawle, 41. *M'Neilledge v. Barclay*, 11 Serg. & Rawle, 103.

(3) A bequest of "twenty negroes" is specific only in the second degree. *Warren v. Wiggfall*, 3 Desaus. Rep. 47.

(4) 3 Desaus. Rep. 373.

circumstances, even pecuniary legacies are held to be specific. As a certain sum of money in a certain bag or chest (*t*), or in navy [302] or India bills (*u*), or the bequest of a sum of money in the hands of A. (*v*), or of two thousand pounds, the balance due to the testator from his partner on the last settlement between them, if the testator did not draw such money out of trade before he died (*w*). So a devise of a rent-charge out of a term for years (*x*), and a bequest of a bond, or of the testator's stock (1) in a particular fund, have been thus classed (*y*), as likewise has a legacy to be paid out of the profits of a farm, which the testator directed to be carried on (*z*). And a bequest of all the testator's personal estate in a certain town has been so considered (*a*).

In like manner the testator may carve specific legacies out of a specific chattel; as where he gives part of the debt due to him from A., it will be a specific legacy (*b*). So a bequest of part of the testator's stock in a certain fund shall bear the same construction (*c*). But a testator reciting that he had 1500*l.* 5 per cents, gave it to A. and then gave to B. all other his stocks that he might be possessed of at his death; the latter bequest is not specific, but is liable to debts in preference to the former (*d*).

So where A. devised to his wife all his personal estate at B., (2) this was held to be a specific legacy; and the same as if he had enumerated all the particulars there (*e*).

On the other hand, a mere bequest of *quantity*, whether of money or of any other chattel, is a general legacy; as of a quantity of stock (*f*). And where the testator has not such stock at his death, such bequest amounts to a direction to the executor to procure so much stock for the legatee (*g*).

(*t*) *Lawson v. Stich*, 1 Atk. 508.

(*u*) *Pitt v. Lord Camelford*, 3 Bro. Ch. Rep. 160. *Gillaume v. Adderley*, 15 Ves. jun. 384.

(*v*) *Hinton v. Pinke*, 1 P. Wms. 540.

(*w*) *Ellis v. Walker*, Amb. 310.

(*x*) *Long v. Short*, 1 P. Wms. 403.

(*y*) *Ashburner v. Macguire*, 2 Bro. Ch. Rep. 108. *Forrest*, 152. *Avelyn v. Ward*, 1 Ves. 425. 1 Eq. Ca. Abr. 298. *Ashton v. Ashton*, 3 P. Wms. 384.

(*z*) *Mayott v. Mayott*, 2 Bro. Ch. Rep. 125. *Vid. All Souls' College v. Coddington*, 1 P. Wms. 598.

(*a*) *Sayer v. Sayer*, Prec. Ch. 392.

(*b*) *Heath v. Perry*, 3 Atk. 103.

(*c*) *Sleech v. Thorington*, 2 Ves. 563. See 2 Fonbl. 374. note O. 1 P. Wms. 540, note 1.

(*d*) *Parrott v. Worsfield*, 1 Jac. and Walk. Rep. 594.

(*e*) 2 Fonbl. 376. *Sayer v. Sayer*, 2 Vern. 688.

(*f*) 1 P. Wms. 540, note. *Purse v. Snaplin*, 1 Atk. 414. *Sleech v. Thorington*, 2 Ves. 562.

(*g*) *Partridge v. Partridge*, Ca. Temp. Talbot, 227. *Mann v. Copland*, 2 Madd. Rep. 223.

(1) A bequest of all the testator's right, interest, and property, in thirty shares in the *Bank of the United States of America*, is a specific legacy. *Walton v. Walton*, 7 Johns. Cha. Rep. 258. See also *Cuthbert v. Cuthbert*, 3 Yeates, 486.

(2) So, "I leave to my beloved wife C. the whole property that she brought me, except two negro slaves John and Maurice," is a specific legacy. *Warren v. Wigfall*, 3 Desaus. Rep. 47. So, "I give and devise unto my beloved wife B. S. two cows, she to have the choice out of all my cattle; and also to have my bed and bedstead, with all belonging to it, and as much of my house and furniture as she thinks proper." *Comm. v. Shelby*, 13 Serg. & Rawle, 348. See also *Loock v. Clarkson*, *Stuart v. Carson's Ex.* 1 Desaus. Rep. 471, 501.

On a bequest of 1,000*l.* long annuities “now standing in my name or in trust for me,” where at the date of the will, the testatrix had no long annuities, but had 1,000*l.* 3 per cent. reduced annuities, it was held, that that sum passed by the bequest (*h*).

But if a testator gives a sum in stock, *standing in his name*, and has not the stock described, nor any other stock, the legacy fails (*i*). And where a testator being indebted on mortgage, and possessed of 5,000*l.* stock, by his will gave to A. and B. all the stock he had in the 3 per cents., *being about* 5,000*l.* except 500*l.* which he gave to C.; and he devised other specific parts of his property to be sold, and the produce to be applied in discharge of the mortgage; and afterwards the testator sold out 2,000*l.*, part of the 5,000*l.*, and paid off the mortgage with it: this was held to have redeemed the legacy *pro tanto*, and that the specific legatees could have no relief from the funds by the will appropriated for payment of the mortgage (*k*).

So the purchase to which a general legacy is to be applied will not alter its nature; as where it is directed to be laid out in land (*l*). Personal annuities given by will are also general legacies (*m*). The same legacies may be specific in one sense, and pecuniary in another; specific as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it (*n*).

In a case before Lord Camden C., his lordship took the distinction between a legacy of a certain sum due from a particular person, and a legacy of such debt generally, considering the former as a legacy of quantity, the latter as specific (*o*). So, in another case, where, after the following bequest, “I give to A. one thousand four hundred pounds, for which I have sold my estate this day;” the testator received the whole of that sum, paid it into his banker’s, and drew out one thousand one hundred pounds of the money; this was also held by Lord Bathurst C. to be a legacy of quantity (*p*). But Lord Thurlow C. disallowed that distinction (*q*); and held a legacy of “the principal of A.’s bond for three thousand five hundred pounds,” to be a specific legacy, notwithstanding the sum was named. (1)

(*h*) *Penticost v. Ley*, 2 Jac. & Walk. 207.

(*i*) *Evans v. Trip*, 6 Madd. Rep. 91.

(*k*) *Humphreys v. Humphreys*, 2 Cox’s Rep. 184.

(*l*) *Hinton v. Pink*, 1 P. Wms. 540.

(*m*) *Hume v. Edwards*, 3 Atk. 693.
Lewin v. Lewin, 2 Ves. 417. 2 Fonbl. 378.

(*n*) *Smith v. Fitzgerald*, 3 Ves. and Bea. 5.

(*o*) 2 P. Wms. 330, note 1. *Attorney-General v. Parkin*, Ambl. 566.

(*p*) *Carteret v. Carteret*, cited 2 Bro. Ch. Rep. 114.

(*q*) *Ashburner v. Macguire*, 2 Bro. Ch. Rep. 113, 114.

(1) So a bequest of “all the money due on a bond against P. P. and J. P.” is a specific legacy. *Stout v. Hart*, 2 Halst. Rep. 414.

A legacy to a natural child, of "5,000*l.* sterling, or 50,000 current rupees," afterwards described as "now vested in the East India Company's bonds," and sometimes mentioned as "the said sum of 5,000*l.* sterling," Lord Eldon held not specific but general; as a demonstrative legacy, with a fund pointed out (*r*).

Such are the different species of legacies. They are next to be considered as lapsed or vested. It is a general rule, that if a legatee die before the testator, the legacy shall be lapsed (*s*), (1) and [304] sink into the residuum of the testator's personal estate; nor is it an exception that the legacy is left to A., his executors, administrators, or assigns (*t*); or to A. and his heirs. (2) And although in the bequest of a legacy to A. the testator should express an intention that it should not lapse in case A. die before him, this is not sufficient to exclude the next of kin (*u*). Yet a bequest may be specially framed, so as to prevent its lapse on such previous death of the legatee, as if in case of the death of A. before the testator, other persons are named to take, for instance, A.'s legal representatives (*v*), or the "heir under this will" (*w*); or to A. "and failing him by decease before me to his heirs," the legacy on A.'s so dying shall vest in such nominees (*x*). Nor is a legacy to two or more within the rule; for it is settled, that a legacy to several persons is not extinguished by the death of one of them, but shall vest in the survivor (*y*). So where a legacy was given to a daughter for life, with a power to appoint the principal, to take effect after her death, and if no appointment, then to A. and B., and the daughter died in the lifetime of the testator, the Court held, that A. and B. took immediately upon the testator's death; that their

(*r*) *Gillaume v. Adderley*, 15 Ves. jun. 384.

(*s*) 4 Bac. Abr. 387. *Elliott v. Davenport*, 1 P. Wms. 83. *Hutcheson v. Hammond*, 3 Bro. C. C. 142.

(*t*) *Maybank v. Brooks*, 1 Bro. Ch. Rep. 84. *Tidwell v. Ariel*, 3 Madd. Rep. 403.

(*u*) *Sibley v. Cook*, 3 Atk. 572.

(*r*) *Bridge v. Abbott*, 3 Bro. C. C. 224.

(*w*) *Rose v. Rose*, 17 Ves. jun. 347. *Vaux v. Henderson*, 1 Jac. and Walk. 388.

(*x*) *Sibley v. Cook*, 3 Atk. 572. See also *Sibthorp v. Moxan*, 3 Atk. 580.

(*y*) *Northey v. Burbage*, Gilb. Rep. 137. *Buffor v. Bradford*, 2 Atk. 220. *Ryder v. Wager*, 2 P. Wms. 331.

(1) *Weishaupt v. Brehman*, 5 Binn. 118. *Robinson v. Martin*, 2 Yeates, 525. By the Act of 19th March, 1810, (Purd. Dig. 519. 5 Sm. Laws, 512.) it is provided, that "no devise or legacy in favour of a child, or other lineal descendant of any testator, shall be deemed or held to lapse or become void, by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator, but such devise or legacy shall be good and available in favour of such surviving issue, with like effect, as if such devisee or legatee had survived the testator: *Provided always*, that nothing herein contained shall be construed to affect any devise or legacy contained in the last will of any testator who shall have deceased before the passing of this act: *And provided also*, that nothing herein contained shall be construed to defeat the intention of any testator to exclude such surviving issue or any of them."

(2) *Dickinson v. Purvis*, 8 Serg. & Rawle, 71. *Sword's Lessee v. Adams*, 3 Yeates, 34, a devise to a granddaughter before the Act of 19th March, 1810.

interest was postponed only for the sake of the daughter, and that it made no difference that she might have defeated the gift by appointment, if she had survived the testator, since A. and B. were to take if no appointment (*w*). But where two several legacies were given to A. and B., and in case A. or B. died without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, administrators, or assigns, and A. died without issue in the testator's lifetime, it was held to have lapsed, the contingency on which it was given over being too remote. Nor does the rule extend to a legacy given over after the death of the first legatee, for in such case the legatee in remainder shall have it immediately (*x*). Nor will a legacy lapse by the death of the legatee in the testator's lifetime, if he is to take in the character of trustee (*y*).

A bequest by the obligee to one of joint obligors of a debt due on the bond, in these terms—"I *remit* and *forgive* to T. W. the sum of 500*l.* which he stands indebted to me on his bond; and I direct the said bond *to be delivered up to him and cancelled*," is merely a personal legacy to T. W., and lapses by his death in the lifetime of the testator; for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, and the representatives of the deceased legatee, are not discharged from the payment of the money due on the bond (*z*).

A legacy is also lapsed if, before the condition on which it is given by the will be performed, the legatee die, or if he die before [305] it is vested in interest (*a*).

So where a bequest was to a son of the testator on his accomplishing his apprenticeship, with the dividends in the mean time for maintenance, and in case he should die *before he accomplished his apprenticeship*, then and in such case to other children, and the legatee died, having accomplished his apprenticeship in the testator's lifetime, it was held a lapsed legacy (*b*). And where an estate was devised, charged with two several legacies to A. and B., and in case A. or B. died without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. and A. died without issue in the testator's lifetime, the legacy was held to have lapsed, the contingency on which it was given over being too remote (*c*).

A legacy given to A. to be paid to him, his executors, &c. within

(*w*) *Chatteris v. Young*, 6 Madd. Rep. 30.

(*x*) 1 And. 33. pl. 82. *Miller v. Warren*, 2 Vern. 207. *Perkins v. Micklethwaite*, 1 P. Wms. 274. *Ryder v. Wager*, 2 P. Wms. 331. *Willing v. Baine*, 3 P. Wms. 113. *Lumley v. May*, Prec. Ch. 37. *Hornsby v. Hornsby*, *Moseley*, 319. *Woodward v. Glassbrook*, 2 Vern. 378. 2 Fonbl. 368, note G.

(*y*) See *Oke v. Heath*, 1 Ves. 140.

Ecles v. England, 2 Vern. 468. 2 Fonbl. 399, note G. and H. *Earl of Inchiquin v. French*, 1 Cox's Rep. 1.

(*z*) *Izon v. Butler*, 2 Price Rep. 34. and see *Toplis v. Baker*, 2 Cox's Rep. 118.

(*a*) 2 Fonbl. 368. 1 Bac. Abr. 410.

(*b*) *Humberstone v. Stanton*, 1 Ves. & Bea. 385.

(*c*) *Massey v. Hudson*, 2 Meriv. 130.

twelve months after the death of B. "*in case B. shall happen to survive my wife*," and B. having died in the lifetime of the testator's wife, the latter words were construed with reference only to the time of payment, and not to make void the legacy (b).

We have already seen that if a legacy be left to A., *payable* to him at a certain age, it is a vested and transmissible interest in him, *debitum in presenti* though *solvendum in futuro*: That it is otherwise, if the legacy be left to him at, or if, or when he attains such age (c). (1) The distinction was borrowed from the civil law, and adopted by our courts, not so much from its intrinsic equity, as from its prevailing in the spiritual courts; for since the chancery, as will be hereafter shown, has a concurrent jurisdiction with them in respect to the recovery of legacies, it is reasonable that there should be a conformity in their decisions, and that the subject should have the same measure of justice, to whatsoever court he may resort. But if such legacies be charged on a real estate, or upon land to be purchased with the residue of a personal estate (d), in either case they shall equally lapse for the benefit of the heir; (2) for with regard to devises affecting lands, the ecclesiastical courts have no concurrent jurisdiction, and therefore the distinction does not extend to them (e). If, as I have before stated, the legacy be made to carry interest, though the words "to be paid" or "payable" are omitted, it is vested and transmissible (f). So if the bequest of B. is vested on the death of the testator, and will not lapse by the death of B. in the lifetime of A. (g).

Where a will recited the probability that the legatee was not living, and gave him a legacy upon express condition that he should return to England, and personally claim of the executrix or in the church porch; and that if he should not so claim within seven years, he was to be presumed dead, and the legacy to fall into the residue: the legatee not having returned, and dying abroad within seven years, Lord Eldon held that the legacy was not due;

(b) *Massey v. Hudson*, 2 Meriv. 130.

(c) Vid. *supr.* 171, 172. 2 Fonbl. 371. note K. *Blois v. Blois*, 2 Ventr. 347. 2 Ch. 155. *Collins v. Metcalfe*, 1 Vern. 462. *Gordon v. Raines*, 3 P. Wms. 138. *Anon.* 2 Vern. 199. *Clobberie's case*, 2 Ventr. 342. *Smell v. Dee*, 2 Salk. 415. *Dawson v. Killet*, 1 Bro. Ch. Rep. 119.

(d) *Harrison v. Naylor*, 2 Cox's Rep. 247.

(e) 4 Bac. Abr. 393. 2 Bl. Com. 513. 1 Eq. Ca. Abr. 295. *Duke of Chandos v. Talbot*, 2 P. Wms. 601. 2 Fonbl.

373. note M.

(f) 2 Fonbl. 371. note K. *Clobberie's case*, 2 Ventr. 342. *Pullen v. Serjeant*, 2 Chan. Ca. 155. *Stapleton v. Cheele*, 2 Vern. 673. *Herbert v. Parsons*, 2 Ves. 263. *Fonereau v. Fonereau*, 3 Atk. 645.

(g) 2 Fonbl. 371. note K. *Anon.* 2 Ventr. 347. *Northey v. Strange*, 1 P. Wms. 342. 566. *Darrel v. Molesworth*, 2 Vern. 378. *Tunstall v. Bracken*, Ambler. 167. *Dawson v. Killet*, 1 Bro. Ch. Rep. 119. 181.

(1) *Patterson v. Hawthorn*, 12 Serg. & Rawle, 113. *Stone v. Massey*, 2 Yeates, 369.

(2) *Stone v. Massey*, 2 Yeates, 369. *Patterson v. Hawthorn*, 12 Serg. & Rawle, 114.

the existence of the legatee, though appearing otherwise, being to be proved by the particular means prescribed, and therefore not within the cases from the civil law, where, the end being obtained, the means were not essential (*h*).

SECT. II.

Of the executor's assent to a legacy—on what principle necessary—what shall amount to such assent—Assent express or implied—absolute or conditional—has relation to the testator's death—when once made, irrevocable—when incapable of being made.

BUT the bequest of a legacy, whether it be general or specific, transfers only an inchoate property to the legatee. To render it complete and perfect, the assent of the executor is requisite (*a*). (1) On him all the testator's personal property is devolved, to be applied in the first place, to the payment of debts; and, therefore, before he can pay legacies with safety, he is bound to see whether, independently of them, a fund has been left sufficient for the demands of creditors.

In case the assets prove inadequate, the legacies must abate or fail altogether, according to the extent of the deficiency. If, on a failure of assets, he pay legacies, he makes himself personally responsible for the debts to the amount of such legacies. Hence, as a protection to the executor, the law imposes the necessity of his assent to a legacy before it can be absolutely vested; and such assent when once given, is considered as evidence of assets, and an admission on the part of the executor that the fund is competent (*b*).

If, without the assent of the executor, the legatee take possession of the thing bequeathed, the executor may maintain an action of trespass against him (*c*). (2) Nor, even in case of a specific legacy, whether a chattel real or personal be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, has he a right to retain it in opposition to the executor, by whom in such case an action will lie to recover it (*d*). Nor has such legatee authority to take possession of the legacy without the

(*h*) *Tulk v. Houlditch*, 1 Ves. & Bea. v. *Whitehead*, 2 P. Wms. 645.
248.

(*a*) 3 Bac. Abr. 84. 2 Bl. Com. 512. (*b*) Off. Ex. 27, 28.
Harg. Co. Litt. 111. *Aleyn.* 39. (*c*) Off. Ex. 27. 223. 3 Bac. Abr. 84.
Abney v. Miller, 2 Atk. 598. *Mead v.* 4 Bac. Abr. 444. *Dyer*, 254. *Keilw.*
Lord Orrery, 3 Atk. 240. *Farrington* 128.
v. Knightly, 1 P. Wms. 554. *Bennet* (*d*) *Mead v. Ld. Orrery*, 3 Atk. 240.
Off. Ex. 222, 223.

(1) *Wilson v. Rine*, 1 Harr. & Johns. 139.

(2) *Ortroyer, Wilson's Ex. v. Rine*, 1 Harr. & Johns. 138.

executor's assent, although the testator by his will expressly direct that he shall do so; for, if this were permitted, a testator might appoint all his effects to be thus taken in fraud of his creditors (*e*). Yet, previously to the assent of the executor, a legatee has such an interest in the thing bequeathed, as that, in case of his death before it be paid or delivered, it shall go to his representative (*f*), or, in case of the outlawry of the legatee, shall be subject to the forfeiture (*g*).

If A. release by will a debt due to him from B., it is the better opinion that the assent of the executor is necessary to give effect to the testator's intention; for although on the one hand it may be alleged that the party to whom the debt is bequeathed must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent as where there is to be a transfer of the property: yet, on the other hand, a debt so released is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts. But as soon as the executor assents, and not before, it shall be effectually discharged (*h*).

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; a very slight assent is held sufficient (*i*). It may be either express or implied, absolute or conditional.

The executor may not only in direct terms authorize the legatee to take possession of the legacy, but his concurrence may be inferred either from indirect expressions or particular acts. And such constructive permission shall be equally available. Thus, for instance, if the executor congratulate the legatee on his legacy; or if a horse is bequeathed to A., and the executor requests him to dispose of it; or if B. proposes to purchase the horse of the executor, and he directs B. to buy it of A.; or if the executor himself purchase the horse of A., or merely offer him money for it; this in either case amounts to an assent by implication to the legacy (*k*). So where A., the devisee of a term, granted it to the executor, his acceptance of the grant from A. was held to be an implied permission that the term should be A.'s to grant (*l*). So where J. S. seised in fee of a foreign plantation, devised it to A., and the executor granted a lease of it for years, reserving rent in trust for A., this was adjudged a sufficient assent (*m*).

If a term be devised to A. for life, remainder to B. the assent of

(*e*) Off. Ex. 223.

(*f*) Off. Ex. 28.

(*g*) Vid. Off. Ex. 29.

(*h*) Off. Ex. 29, 30. *Rider v. Wager*, 2 P. Wms. 332. *Vid. Fellowes v. Mitchell*, 1 P. Wms. 83. *Sibthorp v. Moxam*, 3 Atk. 580.

(*i*) *Noel v. Robinson*, 1 Vern. 94. S.

C. 460. S. C. 2 Ventr. 358. 4 Bac. Abr. 445.

(*k*) 4 Bac. Abr. 445. Off. Ex. 226. Com. Dig. Admon. C. 6. *Shep. Touchs.* 456.

(*l*) Off. Ex. 226.

(*m*) *Noel v. Robinson*, 2 Ventr. 358.

the executor to the devise to A. shall operate as an assent of the devise over to B., and vest an interest in him accordingly (*n*). So an assent to such estate in remainder is an assent to the present estate (*o*): For the particular estate and the remainder constitute but one estate (*p*). But if a lessee for years bequeath a rent to A., and [310] the land to B., the executor's assent that A. should have the rent, is no assent that B. should have the land, because the rent and the land are distinct legacies; but, under special circumstances, an executor's assent to one legacy may enure to another, as if the case last-mentioned be reversed: The executor's assent that B. should have the land seems to imply his assent that A. should have the rent; for the necessity of the executor's assent is established with a view to creditors; now to them the land is equally unproductive, whether it passes to B. charged with the rent, or not; and also, as it was the testator's intention that B. should hold the land subject to the rent to A., the executor's assent to B.'s having the land shall, in conformity to the will, be construed an assent to the legacy to A. (*q*). So an assent to a devise of a lease for years is an assent to a condition or contingency annexed to it: As, if there be a devise of a term to the testator's widow, so long as she continues unmarried; and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage (*r*).

An assent may also be absolute or conditional. If it be of the latter description, the condition must be precedent: As, where the executor assents to the devise of a term, if the devisee will pay the rent in arrear at the testator's death. In that case, if the condition be not performed, there is no assent; but if the assent be on a condition subsequent, as provided the legatee will pay the executor a certain sum annually: such condition is void, and a failure in performing it shall not divest the legatee of his legacy (*s*). The state of the fund may require the executor to impose a condition precedent to his payment of the legacy; but if he once part with it, he has no right to clog it with future stipulations, and make that legacy conditional which the testator gave absolutely (*t*).

The assent of an executor shall have relation to the time of the testator's death. Hence, if A. devise to B. his term of years in tithes, in an advowson, or in a house or land, and after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the under tenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests (*u*). So such assent shall by relation confirm an intermediate grant by the legatee of his legacy (*v*).

(*n*) Com. Dig. Admon. C. 6. 10 Co. 47 b. 1 Roll. Abr. 620. Plowd. 545. in note. Adams v. Price, 3 P. Wms. 12.

(*o*) Com. Dig. Admon. C. 6.

(*p*) Off. Ex. 236.

(*q*) Off. Ex. 237.

(*r*) Com. Dig. Admon. C. 6. 1 Roll. Abr. 620.

(*s*) Com. Dig. Admon. C. 8. Off. Ex. 238. 4 Bac. Abr. 445. Leon, 130, 131.

(*t*) Off. Ex. 238.

(*u*) Off. Ex. 249.

(*v*) Ibid. 250.

If an executor once assent to a legacy, he can never afterwards retract, and, notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy (*t*), and has a lien on the assets for that specific part and may follow them. And an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest (*u*).

If a term is devised to A., and the executor, before he assents to [312] the devise, take a new lease of the same land to himself for a larger term in possession, or to commence immediately, the term devised is merged, so that it cannot pass to A., although the executor should afterwards assent (*v*). An assent to a void legacy is also void (*w*).

Such is the nature of an executor's assent to a legacy. We have already seen that he is competent to give it before probate (*x*). But if he has not attained the age of twenty-one years, he is incapable by the above-mentioned stat. 38 Geo. 3. c. 87. (*y*), of the functions of an executor, and therefore his assent is of no validity (*z*).

SECT. III.

When a legacy is to be paid—to whom—of payment in the case of infant legatees—of a married woman—of a conditional payment of a legacy—of payment of interest on legacies—of such payment where the legatees are infants—of the rate of interest payable on legacies.

ON the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be [313] compelled to pay it. The period fixed by the civil law for that purpose, which our courts have also prescribed, and which is analogous to the statute of distribution, (as will be hereafter seen,) is a year from the testator's death, during which it is presumed he may fully inform himself of the state of the property (*a*).

Legacies to C. "and to the heir of his body," to M. "to be secured to her and the heirs of her body," to F. "and to her issue," are absolute legacies: but a legacy to S. "and to her heirs, (say children) S. is only entitled for life (*b*).

If a legacy to an infant be payable at twenty-one, and he die before, his representative cannot claim it till, in case he had lived, he would have come of age (*c*); unless it be payable with interest,

(*t*) Off. Ex. 227. 4 Bac. Abr. 445.
Mead v. Lord Orrery, 3 Atk. 238.

(*u*) Doe v. Guy, 3 East, 120.

(*v*) Off. Ex. 228.

(*w*) Plowd. 526.

(*x*) Vid. supr. 46.

(*y*) Supr. 31.

(*z*) Vid. Com. Dig. Admon. E. Off. Ex. 224.

(*a*) 4 Bac. Abr. 434. Smell v. Dee,
2 Salk. 415. pl. 2.

(*b*) Crawford v. Trotter, 4 Madd. Rep.
361.

(*c*) Luke v. Alderne, 2 Vern. 31.
Anon. ib. 199. Papworth v. Moore,
283. Chester v. Painter, 2 P. Wms.

336.

and then, as we have seen, such representative has a right immediately to receive it (*c*). If a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the court will not direct the legacy to be raised until the time for payment arrives, although it will secure a personal fund for a future or contingent legatee (*d*). But where a will directed that certain legacies “were to be paid on the land,” but expressed neither the time nor the manner in which they should be raised; nor did it appear, as the fact was, that the estate was a reversion: the court held, that as a reversion was as capable of being sold or mortgaged as any other estate, the legacies should be raised and paid with interest from the testator’s death, and not from the time of the estate falling in. In case a legacy be left to A. at twenty-one, and if he die before twenty-one, then to B.; and A. die before he attains that age, B. shall be entitled to the legacy immediately; for he does not claim under A., but the devise over is a distinct, substantive bequest, to take effect on the contingency of A’s dying during his minority (*e*).

But where legacies were given to A. B. and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors, and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not repeated, was annex-[314]ed to the whole, whether it accrued by survivorship, or by the original devise (*f*).

A bequest of stock to trustees, upon trust to pay the dividends from time to time to a married woman, for her separate use, is an unlimited gift of the dividends, and consequently passes the capital (*g*).

Where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A. without issue of her body, payment was decreed in the lifetime of A., and without security for refunding (*h*). And where 30,000*l*. South Sea Annuities were given to trustees in trust to pay the dividends to A., until an exchange of certain lands should be made between him and B., and then the capital to be equally divided between them, and B. died before the time limited by the will for making the exchange expired, A. was held to be absolutely entitled to the whole legacy (*i*).

A legacy was given upon condition “that the legatee should

(*c*) 4 Bac. Abr. 434. in note. Har. rison v. Buckle, 1 Stra. 238. 480. Roden v. Smith, Amb. 588. Fonnereau v. Fonnereau, 1 Vez. 118. Green v. Pigot, 1 Bro. Ch. Rep. 105. Hearle v. Greenbank, 1 Vez. 307. Crickett v. Dolby, 3 Ves. jun. 10. Vid. sup. 171. (*d*) Gawler v. Standerwick, 2 Cox’s Rep. 15.

(*e*) 1 Eq. Ca. Abr. 299, 300. Laundry v. Williams, 2 P. Wms. 478.

(*f*) Moore v. Godfrey, 2 Vern. 620.

(*g*) Haig v. Swiney, 1 Sim. & Stu. 487.

(*h*) Fawkes v. Gray, 18 Ves. 131.

(*i*) Lowther v. Cavendish, 1 Eden’s Rep. 99.

“change the course of life he had too long followed, and give up “low company, frequenting public-houses,” &c. The court held that it was such a condition as it would carry into effect; and the evidence not being conclusive, an inquiry was directed, following the words of the bequest (*k*). But where an allowance was bequeathed to a feme covert, on condition that she lived apart from her husband, the court held the bequest to be good, and the condition void, as *contra bonos mores* (*l*). (1)

A legacy was given to three persons, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim the same within three years after the testator's death; and if they should not, part of the amount of the legacies to go over. The legatee over claiming the legacy, a reference was directed to the Master, to enquire whether the three persons had arrived in England, or claimed the legacy within the three years (*m*). Afterwards, one of the legatees arrived in England, and made his claim after the time specified: it was held, the condition was not performed, although the legatee was ignorant till then of the will, or of the testator's death, and no advertisement had been made for legatees (*n*).

Where a legacy was given on condition, that the legatee married with the consent in writing of the executors, and he afterwards married with their approbation, but it was not expressed in writing: it was held, that the legatee was entitled to the legacy, and that the consent of an executor who had not acted was not necessary (*o*).

A legacy was given upon condition that the legatee notified to the executor of the testator his willingness to release certain claims, and he filed his bill. The court held that he had forfeited his right to the legacy (*p*). But where a testator gave to his son for life the interest of a mortgage upon an estate of which he was tenant for life in remainder at the testator's death, and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon the testator's estate, and of his not contesting the will, though the son lived fourteen months after the

(*k*) Tattersall v. Howell, 2 Meri. Rep. 26.

(*l*) Brown v. Reck, 1 Eden's Rep. 140.

(*m*) Burgess v. Robinson, 1 Madd. 172. and see Careless v. Careless, 1 Meri. Rep. 384. and S. C. 19 Ves. 601.

(*n*) Burgess v. Robinson, 3 Meri. Rep. 7.

(*o*) Worthington v. Evans, 1 Sim. & Stu. 165.

(*p*) Vernon v. Bethell, 2 Eden's Rep. 110.

(1) A testator, by his will dated September 25th 1815, gave to his daughter, “during her separation from W. C. her husband, one thousand dollars a year,” which he charged on his real estate. W. C. and his wife were living separate when the will was made, but cohabited together in February 1815, when the testator made a codicil to his will (changing only the executors), and also at his death, but separated immediately after his decease, and continued to live separate until within a short time previous to filing the bill by W. C. and his wife, against the executors for the legacy. Held, that the plaintiffs were not entitled to the legacy. *Cooper et ux. v. Remsen*, 3 Johns. Cha. Rep. 382. 521. S. C. 5 Johns. Cha. Rep. 459.

testator's death without executing a release, and, upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; yet the circumstance of his never having paid any part of the interest of the mortgage, his having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance (*q*).

A testator authorised his executors, at any time before T. L. attained the age of twenty-six years, to raise, by sale of a sufficient part of certain stock, any sum of money not exceeding 600*l*., and to pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L. as the said executors should think proper; and at the age of twenty-six he gave the 600*l*. to T. L. absolutely. The executors declined to act, and the court refused to give the 600*l*. to T. L. before twenty-six, without referring it to the Master to inquire whether T. L.'s situation required the 600*l*. or any part thereof to be advanced (*r*).

The next object of inquiry is, to whom a legacy shall be paid. And here the executor must be careful to pay it into that hand which has authority to receive it.

It is a general rule, that he has no right to pay it to the father, or any other relation of an infant, without the sanction of a court of equity (*s*); (1) and even in the case of an adult child, such payment is not good, unless it be made by the consent of the child, or be confirmed by his subsequent ratification (*t*).

Cases occur where an executor has, with the most honest intentions, paid the legacy to the father of the infant, and has been held liable to pay it over again to the legatee on his coming of age. And although such cases have been attended with many circumstances of hardship in respect to the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interest of infants, and so naturally productive of domestic discord. The child must in case of such payment either acquiesce, or resort to the father; or, which is in effect the same, institute a suit against the executor, who will of course require the father to refund (*u*). Thus legacies of one hundred pounds a-piece were bequeathed to four infants; the executor paid the legacies to the father, and took his receipt for them: when one of the legatees came of age, who was about ten years old at the time of payment, the father told him, that he had such a legacy of his in his hands, but could not pay it immediately, and requested him not to apply to the executor, at the same time promising that he would

(*q*) *Earl of Northumberland v. Mar-* Thornton, 3 Bro. Ch. Rep. 97.
quis of Granby, 1 Eden's Rep. 489. (*u*) 1 Eq. Ca. Abr. 300. *Cooper v.*
(*r*) *Lewis v. Lewis*, 1 Cox's Rep. 162. Thornton, 3 Bro. Ch. Rep. 96. 186. 4
(*s*) 4 Bac. Abr. 429. 1 Chan. Ca. 245. Burn. Eccl. L. 321. *Holloway v. Col-*
(*t*) 4 Bac. Abr. 431. *Cooper v.* lins, Chan. Ca. 245. 3 Ch. Ca. 168.

(1) *Genet v. Tullmudge*, *Morrell v. Dickey*, 1 Johns. Cha. Rep. 3, 153.

himself pay it. The son acquiesced for fourteen or fifteen years, during which period his father and he carried on a joint trade, and then became bankrupts. On a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the assignee filed a bill against the executor, for an account and payment of the legacy, when it was decreed accordingly by the Master of the Rolls, but without interest; and the decree affirmed by the Lord Chancellor on an appeal. His lordship, however, on the hardship of the case, ordered the deposit to be divided (*t*). It appears from the registrar's book, that in the above case evidence was read, that the testator on his death-bed gave direction, that the executor should pay the legacies to the father of the infants, that he might improve the money for their [316] benefit (*u*). But although that circumstance, if true, rendered the case still harder, yet it could not influence the decision, since the evidence ought not to have been received. It were dangerous to admit proof, that a legacy given to one person was ordered to be paid to another (*w*). If the direction had appeared on the face of the will, the decree, doubtless, would have been different (*x*). So, where A. left a legacy of a hundred pounds to each of the three children of B. and appointed C. her executor, leaving him the bulk of her estate, provided he paid those three legacies within a year after her death: The defendant within that period paid into the children's own hands their several legacies; the eldest of whom was then sixteen years, the second fourteen, and the youngest only nine: on her coming of age, they filed a bill against the executor to be paid their respective legacies; suggesting that their father had embezzled the money, and was insolvent, and that the payment was a fraud: The defendant in his answer denied all knowledge of the money's ever having come to the father's hands: The Lord Chancellor held at first, that as the executor paid these legacies to save a forfeiture of what he himself took under the will, he ought not to pay them over again; but, on farther consideration, conceiving the point to be very doubtful, his lordship recommended a compromise; and the defendant agreeing to [317] pay fifty pounds, to be divided between the three plaintiffs, without costs on either side, they were ordered to release their legacies (*y*).

The rule, however, is not so harsh, as that in all possible cases an executor shall be liable to pay over again legacies of infants, which he shall have paid to their parents (*z*). Thus, where A. bequeathed to J. S. a hundred pounds to be equally divided between himself and his family, the executrix paid the legacy to J. S.

(*t*) *Dagley v. Tolferry*, 1 Eq. Ca. Ab. 300. 1 P. Wms. 285. S. C. Gilb. Rep. 103. S. C. 4 Burn. Eccl. L. 321. S. C. Vid. also *Philips v. Paget*, 2 Atk. 81. and *Cooper v. Thornton*, 2 Bro. Ch. Rep. 96.

(*u*) 1 P. Wms. 286. in note. *Cooper*

v. Thornton, 3 Bro. Ch. Rep. 96.

(*w*) *Cooper v. Thornton*, 3 Bro. Ch. Rep. 96. Vid. *Maddox v. Staines*, 2 P. Wms. 421.

(*x*) Vid. *infr.*

(*y*) *Philips v. Paget*, 2 Atk. 80, 81.

(*z*) *Ibid.* 81.

who had a wife and seven children, six of whom are adults, and the seventh an infant : Eleven years after the youngest had come of age, and the legacy never having been demanded, they filed their bill against the executrix for the same, insisting that the payment to their father was invalid : It was held, that according to the terms of the will, the legacy was properly paid to J. S. ; and that it belonged to him as trustee to divide it : And even on supposition, that the payment was wrong, the great laches, and long acquiescence of the plaintiffs precluded them from all remedy (*a*). But where A. bequeathed his personal estate to trustees, in trust to pay six hundred pounds to an infant, and directed that such of his legatees as might be infants at the time of his decease, should receive interest at the rate of five *per cent.* till their respective legacies should be paid, namely, at their age of twenty-one years; it was holden, that the executors could not justify paying any part [318] of the principal to the infant, or to his use, before that time, except for absolute necessities (*b*).

In case a legacy be too inconsiderable in point of value, to bear the expence of an application to the court of chancery, it seems an executor will be justified in paying it into the hands of the infant, or, which amounts to the same thing, to the father (*c*); but in general he is not warranted in so doing, unless he be clearly authorized by the will. And if a suit be instituted in the spiritual court for an infant's legacy by the father to have it paid into his hands, an injunction (*d*), or prohibition (*e*), will be granted.

But an executor may discharge himself from all responsibility on this head by virtue of the stat. 36 *Geo.* 3. c. 52. § 32. by which it is enacted, that where, by reason of the infancy, or absence beyond the seas, of any legatee, the executor cannot pay a legacy chargeable with duty by virtue of that act, (that is to say) given by any will or testamentary instrument of any person who shall die after the passing of that act, it shall be lawful for him to pay such legacy, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the court of chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his [319] certificate, on production of the certificate of the commissioners of stamps that the duty thereon hath been duly paid ; and such payment into the bank shall be a sufficient discharge for such legacy, which when paid in shall be laid out by the accountant-general in the purchase of 3 *per cent.* consolidated annuities, which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on appli-

(*a*) *Cooper v. Thornton*, 3 Bro. Ch. Rep. 96.

(*b*) 4 Bac. Abr. 433. *Davies v. Austen*, 3 Bro. Ch. Rep. 178.

(*c*) 4 Burn. Eccl. L. 321. 1 Ch. Ca. 245. *Philips v. Paget*, 2 Atk. 81. Com. Dig. Chancery, (3 G. 6.) Vid. *Seton*

v. Seton, 2 Bro. Ch. Rep. 615. Off. Ex. 219, 220. *Bilson v. Saunders*, Bunb. 240.

(*d*) *Rotheram v. Fanshaw*, 3 Atk. 629. Per Ld. Hardwicke, C. arguendo.

(*e*) 4 Bac. Abr. 429, in note. Godb. 243.

cation to the court of chancery by petition, or motion, in a summary way.

But the executor is not bound so to pay the legacy into the bank till the expiration of a year from the testator's death.

Where personal property is bequeathed for life, with remainder over, and not specifically, it is a general rule that it be converted into 3 *per cents.* subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties (*f*).

But this general rule does not attach upon property of a testator, who makes his will, and dies in India, leaving property and a family there, unless the parties come to this country, and then the person in remainder is entitled to have the fund brought here and invested (*g*).

It has been decided, that if an executor have a general power to divide a sum of money among children at his discretion, and he make an unreasonable disposition, it will be controlled in a court of equity (*h*). As, where A. having two daughters, one by a former marriage, and the other by a second, devised his estate to his wife, to be distributed between his daughters as she should think fit, and she gave a thousand pounds to her own daughter, and only a hundred to the other; an equal distribution was decreed (*i*). In like manner where A. having appointed his two daughters his executrices, gave them four hundred pounds, to be distributed among themselves and their brothers and sisters, according to their necessity, as the executrices, in their discretion, should think fit; the court settled the distribution, and decreed a double share to one [320] of the children, as standing in greater need of it (*k*). But where the testator left a legacy to his wife, and executrix, to be disposed of among their children in such manner as she should think fit; it was held that if she make an inequality, the court will not enter into the motives of it unless it be illusory, and if she give a mere trifle to one of them; and even in that case if the child's misbehaviour has been very gross, it shall not be varied. And it seems now settled, that in cases where an executor has such a discretionary power, he may give a larger share to one of the objects than to another, provided the share of both be substantial, and not illusory or merely nominal (*l*).

Where a legacy was given to A-, but if the executors after named should think it more for his advantage to have it placed out and to

(*f*) *Howe v. Earl of Dartmouth*, 7 Ves. jun. 137.

(*g*) *Holland v. Hughes*, 16 Ves. jun. 111.

(*h*) 4 Bac. Abr. 340. *Gibson v. Kinvén*, 1 Vern. 66. *Thomas v. Thomas*, 2 Vern. 513. *Alexander v. Alexander*, 2 Ves. 640. *Upton v. Prince*, Ca. Temp. Talb. 72.

(*i*) *Wall v. Thurborne*, 1 Vern. 355.

(*k*) Com. Dig. Chan. (4 W. 11.) *City of London v. Richmond*, 2 Vern. 421.

(*l*) *Maddison v. Andrews*, 1 Ves. 57. vid. also *Alexander v. Alexander*, 2 Ves. 640. *Swift v. Gregson*, 1 Term Rep. 432. *Nisbett v. Murray*, 5 Ves. jun. 149. *Longmore v. Broom*, 7 Ves. jun. 124. and *Butcher v. Butcher*, 9 Ves. jun. 382.

pay him the interest for life, as they in their discretion should think fit, and directing that after his disease the said sum should be divided among his children, and for default of children over: one of the executors being dead, and the other having renounced, the legacy was held to be absolute in the legatee (*m*).

A testator expressed his will and desire, that one-third of the principal of his estate and effects should be left entirely to the disposal of his wife, among such of her relations as she might think proper, after the death of his sisters. The wife died without making any disposition, and it was held a trust for the next of kin at the time of her death (*n*).

If a legacy be given to a married woman, it must be paid to the husband. So where a legacy was given to a married woman living separate from her husband with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest (*o*). It hath also been adjudged, that if the husband and wife are divorced *à mensâ et thoro* and the legacy [321] is left to her, the husband alone may release it (*p*); and, consequently to him alone it is payable. But the executor, in cases where the husband has made no provision for the wife, may decline paying such legacy, if it amount to the sum of two hundred pounds, unless he will make an adequate settlement on her (*q*). Nor will the court of chancery interpose in his favour, but on the same terms (*r*); unless the wife appear in court and consent to his receiving it (*s*). And if a woman, who is or has been married, is entitled to a legacy, the court expects a positive affidavit, that the legacy has not been in any manner settled, before it will direct payment to her (*t*).

Nor does the court confine its interposition in favour of the wife, and compel a provision for her against those persons only, who are seeking to obtain her property by the assistance of the Court; but in extension of the principle of those cases, in which equity restrains the husband from proceeding in the ecclesiastical court, because that jurisdiction cannot enforce a settlement for the wife, will entertain a bill by a married woman against an executor or administrator, and the husband praying for a provision out of a legacy bequeathed to

(*m*) Keates v. Burton, 14 Ves. jun. 434.

(*n*) Birch v. Wade, 3 Ves. & Bea. 198.

(*o*) Palmer v. Trevor, 1 Vern. 261. 4 Burn. Eccl. L. 332. L. of Test. 265.

(*p*) 4 Bac. Abr. 433. 1 Roll Abr. 343. 2 Roll. Abr. 301. S. C. Moore, 665. Rye v. Fuljambé, 683. Stephens v. Totty, Cro. Eliz. 908. Stephens v. Totty, Noy, 45. Motam v. Motam, 1 Roll. Rep. 426. S. C. 5 Buls. 264. Chamberlain v. Hewson, Salk. 115. pl.

4. S. C. Ld. Raym. 73. S. C. 5 Mod. 69. and 12 Mod. 89.

(*q*) Lady Elibank v. Montolieu, 5 Ves. jun. 742. in note.

(*r*) Milner v. Colmar, 2 P. Wms. 639. Adams v. Peirce, 3 P. Wms. 11. Brown v. Elton, ib. 202.

(*s*) Willats v. Cay, 2 Atk. 67. Milner v. Calmer, 2 P. Wms. 641. Parsons v. Dunne, 2 Ves. 60. Sed vid. ex parte Higham, 2 Ves. 579.

(*t*) Hough v. Ryley, 2 Cox's Rep. 157.

her, or out of a share of an intestate's estate to whom she is next of kin (*u*).

If a legacy be left to the senior six clerk, to be divided between himself and the other six clerks, it seems that it ought to be paid to the senior, and that it would not be incumbent on the executor to make any enquiry respecting the others (*w*).

Commissioners of Bankrupt may assign a legacy left to a bankrupt before his bankruptcy (*x*); and although it be left after his certificate has been signed by the creditors and commissioners, if before its allowance by the Lord Chancellor (*y*); consequently, in such case the legacy must be paid to the assignees.

Although, as it has been already stated, payment by an executor of a debt by simple contract, before the breach of the condition of a bond, is good, and shall not be impeached by its happening afterwards (*z*), yet payment of a legacy under the same circumstances [322] shall not be allowed. It was, indeed, formerly held, that such bond should not hinder the payment of a legacy, because it was uncertain whether the bond would be ever forfeited, but that the executor should pay the legacy conditionally, and take security of the legatee to refund in the event of a forfeiture of the obligation (*a*). And in all cases, where a suit was instituted in the spiritual court to compel an executor to pay a legacy without a security from the legatee to refund in case of a deficiency of assets, the court of chancery would grant a prohibition (*b*): yet that practice no longer exists. Equity will not now interfere (*c*), but will compel a legatee to refund, where the estate proves insufficient, whether security has been given for such a purpose or not (*d*).

A legacy must be paid in the currency of the country, in which the testator was resident at the time of making the will. Thus it has been decided, that where a party living in Ireland, or in the West Indies, gives legacies by his will generally, they are payable according to the currency of those respective countries (*e*). Nor is the case varied by the legatee's residing in England (*f*); nor by [323] the testator's having left effects partly here and partly abroad, unless he shall have separated the funds, and charged the legacies

(*u*) *Lady Elibank v. Montolieu*, 5 Ves. jun. 737. See *Wright v. Rutter*, 2 Ves. jun. 276. *Meales v. Meales*, 5 Ves. jun. 517. in note, and *Carr v. Taylor*, 10 Ves. jun. 578. and *infr.* 490.

(*w*) Per M. R. *arguendo*, *Cooper v. Thornton*, 3 Bro. Ch. Rep. 99.

(*x*) *Cooke's B. L.* 371. Com. Dig. Bankrupt (D. 16.) *Toulson v. Grout*, 2 Vern. 433.

(*y*) *Tredway v. Bourn*, 2 Burr. 716.

(*z*) *Supr.* 282.

(*a*) 3 Bac. Abr. 84. 1 Roll. Abr. 928. 4 Burn. Eccl. L. 332. *Noel v. Robinson*, 2 Vent. 358.

(*b*) 4 Burn. Eccl. L. 332, 333. *Grove v. Banson*, 1 Chan. Ca. 149. *Noel v. Robinson*, 2 Vent. 358. S. C. 1 Vern. 93.

(*c*) *Anon.* 1 Atk. 491. *Hawkins v. Day*, Ambl. 160.

(*d*) *Noel v. Robinson*, 1 Vern. 93, 94. *Hawkins v. Day*, Ambl. 162.

(*e*) *Holditch v. Mist*, 1 P. Wms. 696, note 2. 2 P. Wms. 88, 89, note 1. *Saunders v. Drake*, 2 Atk. 465. *Pearson v. Garnet*, 2 Bro. Ch. Rep. 38. *Malcolm v. Martin*, 3 Bro. Ch. Rep. 50. *Cockrell v. Barber*, 16 Ves. jun. 461.

(*f*) *Saunders v. Drake*, 2 Atk. 466.

on his English property (*g*). If he has given some legacies described as *sterling*, and others without such description, the former are payable in sterling money, the latter in the currency of the country where the testator resided (*h*). In like manner, if a testator living in England bequeath a legacy, whether of a single sum of money, or of an annuity charged on lands in another country, it shall be paid in England, and in English money, and without any deduction for the expences of its remittance (*i*).

In regard to the payment of interest on a legacy, it was formerly held, that in case of a vested legacy charged on lands yielding immediate profits, and no time of payment mentioned in the will, interest should, in respect of such profits, be made payable from the death of the testator (*k*); or that a legacy given out of a personal estate consisting of mortgages bearing interest, or of money in the public funds, the dividends of which are paid half-yearly, should for the same reason carry interest from the same period (*l*); or that interest on a specific legacy, where it produces interest, should be computed from the time of the testator's death: It being severed from the rest of his estate, and specially appropriated for the benefit of the legatee, it should therefore carry interest immediately (*m*). But if a legacy were given generally out of a personal estate, and no time specified by the testator, such legacy should carry interest only from the expiration of the year next after his decease, (1) on the principle that the executor might be reasonably allowed that time for the collecting of the effects (*n*). So it was held, that if a legacy were given, charged on a dry reversion, it should carry interest from a year next after the death of the testator: inasmuch as a year was a competent time for a sale (*o*). But the rule that the payment of interest should depend on the fund's being productive or barren, is now exploded: and, generally speaking, interest for a legacy is payable only from a year after the death of the testator: (2) Although he should have left stock only, and no other property, yet now no interest would be given, upon legacies bequeathed by him, till the end of a year next after his death (*p*).

(*g*) *Ibid.* *Pearson v. Garnet*, 2 Bro. Ch. Rep. 47.

(*h*) *Saunders v. Drake*, 2 Atk. 465. *Pearson v. Garnet*, 2 Bro. Ch. Rep. 38. *Malcolm v. Martin*, 3 Bro. Ch. Rep. 50.

(*i*) *Wallis v. Brightwell*, 2 P. Wms. 88. *Holditch v. Mist*, 1 P. Wms. 696.

(*k*) 4 Bac. Abr. 439. *Maxwell v. Wettenhall*, 2 P. Wms. 26. 2 Bl. Com. 513.

(*l*) *Maxwell v. Wettenhall*, 2 P. Wms. 26. and note 2. *Lloyd v. Williams*, 2

Atk. 108. *Beckford v. Tobin*, 1 Ves.

308. *Bilson v. Saunders*, Bunb. 240.

Stonehouse v. Eyelyn, 3 P. Wms. 253.

(*m*) *Lawson v. Stitch*, 1 Atk. 508.

Sleech v. Thorington, 2 Ves. 563.

(*n*) *Maxwell v. Wettenhall*, 2 P.

Wms. 26, 27. *Lloyd v. Williams*, 2 Atk.

108.

(*o*) *Maxwell v. Wettenhall*, 2 P. Wms.

26.

(*p*) *Gibson v. Bott*, 7 Ves. jun. 96,

97.

(1) 1 Binn. 475. 14 Serg. & Rawle, 238.

(2) See *Cogdell's Ex. v. Cogdell's Heirs*, 3 Desaus. Rep. 387. *Ingraham & Postell's Ex. v. Gillon v. Turnbull*, 1 McCord's Cha. Rep. 94, 148.

Simple contract debts of another person, charged by the will of a testator upon his real estates, are legacies, and carry interest from the death of the testator at 4 *per cent.* (*o*).

If an annuity be given by the will, it shall commence immediately from the testator's death, and, consequently, the first payment shall be made at the expiration of a year next after that event. But if a sum of money be directed by the will to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year as an annuity payable from the testator's death, seems to be a doubtful point (*p*).

An annuity however, given by will, with a direction that it shall be paid monthly, the first payment is to be made at the end of a month after the testator's death (*q*). (*1*).

If a portion of the testator's estate not required for the payment of debts and legacies be invested at the time of his death upon securities carrying interest, the tenant for life of the residue is entitled to such interest from the time of the death of the testator (*r*).

Although the interest of residue goes with the capital, that of particular legacies does not, even supposing it to be the payment, and not the vesting, that is postponed. Therefore where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue (*s*).

[325] If a legacy, whether vested or not, be payable on a certain day, and the will be silent in respect to interest, it is a general rule, that the interest shall commence only from that time : for it is given for delay of payment, and, consequently, till the day of payment arrives, no interest can accrue to the legatee (*t*). (*2*) Hence, as we have seen (*u*), if a legacy be left to A. to be paid at twenty-one, and he die before, his representative shall wait till he would have attained that age, unless it were made payable with interest. Nor is it, in such cases, a question of construction, as whether the payment is suspended on account of the imbecility of the party, or with a view to the benefit of the estate. The rule I have just stated is technical, established in the ecclesiastical court, and adopted by the

(*o*) *Shirt v. Westby*, 16 Ves. jun. 393.

(*p*) *Gibson v. Bott*, 7 Ves. jun. 95,
97.

(*q*) *Houghton v. Franklin*, 1 Sim. &
Stu. 390.

(*r*) *Angerstein v. Martin*, 1 Turn.
232. *Hewitt v. Morris*, ib. 241.

(*s*) *Lcake v. Robinson*, 2 Meriv. Rep.
384.

(*t*) *Heath v. Perry*, 3 Atk. 102.

Hearle v. Greenbank, 716. S. C. 1 Ves.
307. *Smell v. Dee*, 2 Salk. 415. pl. 2.

2 P. Wms. 481. note 1. *Green v. Pigot*,
1 Bro. Ch. Rep. 105. *Ashburner v. M'Guire*,
2 Bro. Ch. Rep. 113. *Crickett v. Dolby*,
3 Ves. jun. 10. *Tyrrell v. Tyrrell*,
4 Ves. jun. 1.

(*u*) *Supr.* 171. 313.

(1) So where one bequeathed to his daughter A. "the interest of 400£. to be paid to her *annually* during her natural life," it was held that the first payment was to be made at the end of a year from the testator's death. *Eggs v. Goldings*, 5 Binn. 475.

(2) *Bilzer's Ex v. Hahn et ux.* 14 Serg. & Rawle, 232. *Lupton v. Lupton*, 2 Johns. Cha. Rep. 628. *Dawes v. Swan*, 4 Mass. Rep. 215.

court of chancery in numerous adjudications (*v*). If legacies are given to A. and B., each to be paid to them at their respective ages of 23 years, and if they should die before that time, then their respective legacies to sink into the residue of the testator's personal estate, such legacies do not carry interest, and no maintenance can be allowed to the legatees (*w*). But if a legacy be given to A. to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. die before twenty-one, several years after the testator, B. is entitled to interest on the legacy from the death of A.; for though in such case it were objected that this being as a new substantive legacy to B., the executor ought to have a year's time for the payment of it; yet the court held, that must be intended to be from the death of the testator, whereas in that case the testator had been dead much longer (*x*).

But the principle does not extend to all cases: It does not apply where the legatee was the child of the testator: there the court will not postpone the payment of interest, even till a year after the death of the parent, but will order it immediately; since, by the law of nature, he was obliged to provide not only a future but a present maintenance for his child, and shall not be presumed to have meant to leave him destitute (*y*). (1) But if a father gives a legacy to a child payable at a future day, and makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment (*z*).

So where a testator directed his executors, as soon as they should think proper after his decease, to sell as much stock as would produce 12,000*l.*, and invest the same in land, upon trust to receive the rents of the land when purchased, and the interest and dividend of the 12,000*l.* until the estate was purchased, and pay the same in equal moieties between his two daughters for their lives, with remainder over; the Court held, that the daughters were not to take the interest until the 12,000*l.* was raised by a sale of the stock, and that this being to be done, "as soon as the executors should think proper after his decease," amounted to the same thing as a direction to raise and pay a legacy as soon as the executors should find it convenient. That the Court adopted a year as the rule of convenience, and that the legacy therefore could not be raised till the end of the year (*a*).

And where the testator devised estates in Jamaica to trustees and their heirs, in trust to maintain and educate his sons during their

(*v*) *Tyrell v. Tyrell*, 4 Ves. jun. 3, 4, 5. *Heath v. Perry*, 102. *Crickett v. Dolby*, 3 Ves. jun. 13. See *Chambers v. Goldwin*, 11 Ves. jun. 1.

(*w*) *Descrambes v. Tomkins*, 1 Cox's Rep. 133. (*z*) *Wynch v. Wynch*, 1 Cox's Rep. 433.

(*x*) *Laundy v. Williams*, 2 P. Wms. 481. (*y*) *Benson v. Maule*, 6 Madd. Rep. 15.

(*g*) *Butler v. Butler*, 3 Atk. 60. 15.

minority, and his daughter until the age of twenty-one years, or day of marriage, which should first happen, and subject thereto, devised the estates to his sons, charged with the payment of 10,000*l.* to his daughter, in case she should live to attain her age of twenty-one years, the same to carry interest from the time of her attaining such age of twenty-one, at the rate of 6*l.* per cent., and to be paid by instalments, the first payment to be made when and if she should attain twenty-one; and the daughter married at the age of eighteen years. Lord Eldon held, that the testator having expressly given interest from the period of the daughter's majority to the time when the legacy was to be paid, could not mean that the child should have nothing during the interval between her marriage and her attaining the age of twenty-one years, and therefore decreed her a reasonable maintenance out of the assets for that period (*a*).

And where a testator gave a legacy to his daughter, to be paid to her at twenty-one or marriage, without interest for the same in the mean time, but if she died before twenty-one or marriage, then the legacy was not to be raised, but was to sink into the residue of his personal estate, and he directed that out of the interest of the legacy certain sums of money should be applied for the maintenance of his daughter: it was held that the interest of the legacy beyond the maintenance was vested in the daughter, and must accumulate for her benefit (*b*).

[326] Whether a legatee, if a natural child, be also comprised within the exception, is not so clear. Lord Hardwicke, C. expressed an opinion in the negative, as well on the principle of law, which recognizes no relationship in such child, as also on the general policy of encouraging marriage, and discountenancing immorality (*c*). In a recent case, the Master of the Rolls intimated, that illegitimate children were to be admitted to the same benefit (*d*). But in a subsequent case, the Court of Exchequer held that they are not (*e*). If, however, it can be implied from the wording of the will that the testator intended it, interest will be allowed from the testator's death (*f*).

Whether a grandchild shall be thus favoured, is a point likewise on which there has been a difference of opinion: such advantage has been, in several instances, denied to him (*g*). (1) But his Honour, in the case just alluded to, appears to have considered him as on the same footing with a child: And that opinion has been con-

(*a*) *Chambers v. Goldwin*, 11 Ves. jun. 1.

(*b*) *Carey v. Askew*, 1 Cox's Rep. 243.

(*c*) *Hearle v. Greenbank*, 1 Vez. 310.

(*d*) *Crickett v. Dolby*, 3 Ves. jun. 12.

(*e*) *Lowndes v. Lowndes*, 15 Ves. jun. 301.

(*f*) *Hill v. Hill*, 3 Ves. & Bea. 183.

(*g*) *Haughton v. Harrison*, 2 Atk. 330.

Butler v. Butler, 3 Atk. 59. 4

Bro. Ch. Rep. 149. in note, and *Des-
crumbees v. Tomkins*, 1 Cox's Rep. 133.

(1) See 2 Johns. Ch. Rep. 628, *Van Bramer v. Hoffman's Ex.* 2 Johns. Ch. 299.

firmed by subsequent adjudications (*h*). The widow of the testator will not be entitled to interest from the time of his death (*i*). A legacy to a nephew, payable at twenty-one, is clearly comprehended under the general rule, and shall carry interest only from the time of payment (*k*). And a legacy to the wife of a nephew, expressly given for the maintenance of herself and children, she being separated from her husband, shall only carry interest from the end of the year after the testator's death; and the court considered it would be introducing a new rule, particularly as the legatee was adult, if it were held otherwise (*l*). But the rule is not applicable to a bequest of a residue, subject to be divested on a contingency; for it would be absurd to say the testator meant to die intestate as to the produce, when he has given a vested interest in the capital (*m*). If a legacy be left to an infant payable at twenty-one, and devised over on his dying before he attains that age, and such event happens, [327] the interest accumulated from the death of the testator to that of the infant shall go to his representative, and not to the remainder-man (*n*). And where legacies were given to infants, payable at twenty-one, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, the legacies were held to bear interest from the death of the testatrix; the infants being her cousins, and destitute of other provision (*o*).

If the father of an infant legatee be living, he is bound by the municipal law, as well as by the ties of nature, to maintain his child. (1) Nor, as it has been frequently held, shall the interest of the legacy be applied to that purpose, unless in cases of great necessity, arising from the distressed and embarrassed circumstances of the parent (*p*). (2) In cases so pressing the infant shall be maintained out of the interest of the legacy, whether it be vested or contingent; and, although the legacy be devised over on the infant's dying before he attains twenty-one (*q*). Indeed, in some recent

(*h*) *Crickett v. Dolby*, 3 Ves. jun. 12. 5 Ves. jun. 194, 195. in note. *Collins v. Blackburn*, 9 Ves. jun. 470. and see *Hill v. Hill*, 3 Ves. & Bea. 183.

(*i*) *Lowndes v. Lowndes*, 15 Ves. jun. 301. *Stent v. Robinson*, 12 Ves. jun. 461.

(*k*) *Crickett v. Dolby*, 3 Ves. jun. 12.

(*l*) *Raven v. White*, 1 Swans. Rep. 553. *S. C.* 1 Wils. 204.

(*m*) *Nichols v. Osborn*, 2 P. Wms. 420. *Vid. Tyrrell v. Tyrrell*, 4 Ves. jun. 4.

(*n*) *Tissen v. Tissen*, 1 P. Wms. 500.

2 P. Wms. 421. note 1. *ibid.* 504. *Green v. Ekins*, 2 Atk. 473. *Chaworth v. Hooper*, 1 Bro. Ch. Rep. 82. *ibid.* 335. *Shepherd v. Ingram*, *Ambl.* 448. *Vid. Butler v. Butler*, 3 Atk. 59.

(*o*) *Pott v. Fellows*, 1 Swans. 561.

(*p*) *Butler v. Butler*, 3 Atk. 60. *Darley v. Darley*, 399. *Vid. Andrews v. Partington*, 3 Bro. Ch. Rep. 69. *Walker v. Shore*, 15 Ves. jun. 122.

(*q*) *Butler v. Butler*, 3 Atk. 60. *Harvey v. Harvey*, 2 P. Wms. 21. But see *Buckworth v. Buckworth*, 1 Cox's Rep. 80.

(1) *Cruget v. Heyward*, 2 Desaus. Rep. 84.

(2) See *Heyward v. Cuthbert*, 4 Desaus. Rep. 415. *Myers v. Myers*, 2 McCord's Ch. Rep. 255.

instances, where the will has contained an express direction for maintenance of the legatees out of the interest of the legacies, and there have been other children, not the objects of the testator's bounty, such maintenance has been ordered, on the ground of the father's not being of ability to educate the favoured children in a manner suitable to their fortunes (*r*). But the court will not make an allowance to a father for the maintenance of a child for the *time past*, although it should appear that he had not been of ability to maintain him, and the will has expressly given the produce to trustees for the child's maintenance (*s*). And the court has made a liberal allowance of maintenance for an infant, in regard to an illegitimate brother unprovided for (*t*).

On occasions extremely urgent, the court will even break in upon the principal; but this authority is exercised very sparingly, and with great caution (*u*). If the legacy be of small amount, and the interest altogether inadequate to the necessities of the infant, the [328] court will order a part of the principal to be immediately paid, and that as well for his education, as for his maintenance (*v*). (1) But if the legacy be devised over in case of the infant's dying before he comes of age, the principal, it seems, shall on no account be subject to such diminution (*w*). (2).

With respect to the *quantum* of the interest thus payable on a legacy, a distinction formerly prevailed between legacies charged on land, and such as were charged on the personal estate. It has been held, that as land never produces profit equal to the interest of money, the Court of Chancery will follow the course of things, and give interest, where it arises from land, one *per cent.* lower than where it arises from personal property (*x*); but this distinction is now exploded: Whether legacies are charged on real or on personal estate, it is become the established practice to allow only four *per cent.* where no other rate of interest is specified by the will. And although pecuniary legacies not having the addition of the word "sterling," are to be paid, as I have already stated, according to the currency of the country where the will was made, yet the interest is to be computed, in conformity to the course of the court,

(*r*) *Hoste v. Pratt*, 3 Ves. jun. 733. Vid. also *Mundy v. Earl Howe*, 4 Bro. Ch. Rep. 223. *Heysham v. Heysham*, 1 Cox's Rep. 179.

(*s*) *Andrews v. Partington*, 2 Cox's Rep. 223.

(*t*) *Bradshaw v. Bradshaw*, 1 Jac. & Walk. 647.

(*u*) *Harvey v. Harvey*, 2 P. Wms.

21. Vid. *supr.* 318, 319.

(*v*) *Barlow v. Grant*, 1 Vern. 255. *Harvey v. Harvey*, 2 P. Wms. 21. Ex parte *Green*, 1 Jac. & Walk. Rep. 253.

(*w*) 4 Bac. Abr. 442. *Leech v. Leech*, 1 Ch. Ca. 249. *Brewin v. Brewin*, Prec. Ch. 195.

(*x*) *Hearle v. Greenbank*, 1 Vez. 308,

309.

(1) *Matter of Bostwick*, 4 Johns. Ch. Rep. 102.

(2) Nor will the interest be applied for maintenance and education, in such a case. *Miles v. Wister*, 5 Binn. 477.

at four *per cent.* and not pursuant to the rate of interest in such country (*y*).

[329] On the payment of a legacy an executor is bound to take a receipt for the same properly stamped according to the value of the legacy, and the relationship of the legatee (*z*).

A testator directing legacies to be paid at the expiration of six months after his death, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors (*a*).

If a testator die in India, and his personal estate be wholly in India, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in England, or to some other person in England for the specific use of the legatee, the amount of his legacy, the legacy duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is to be considered as established there. But if a part of the assets of the testator is found in England, in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy duty is payable in respect of them (*b*).

An executor paid to a legatee for four years an annuity charged on a real estate, without deducting the legacy duty, which was not in fact paid by him according to the provisions of 45 *Geo. 3. c. 28.* until after the legatee had assigned all his interest in such annuity; it was held, that the legatee was liable to repay him the duty, it not being a voluntary payment; and the executor was only made liable by the act for the benefit of government, and not on his own account; he was therefore no more than surety for the legatee, and the case fell within the principles applicable to sureties (*c*).

SECT. IV.

Of the ademption of a legacy.

I PROCEED now to enquire into the nature of an ademption of a legacy.

An ademption of a legacy is the taking away, or revocation of it by the testator. It may be either express or implied. The tes-

(*y*) *Pierson v. Garnet*, 2 Bro. Ch. Rep. 47. *Malcolm v. Martin*, 3 Bro. Ch. Rep. 53. 4 Bac. Abr. 440. in note.

(*z*) *Vid.* Append.

(*a*) *Barksdale v. Gilliat*, 1 Swans. 562. and see *Waring v. Ward*, 5 Ves. 670.

(*b*) *Logan v. Fairlie*, 2 Sim. & Stu. 284. and see *Attorney-General v. Cockrell*, 1 Price, 165. and *Attorney-General and Beatson*, 7 Price, 560.

(*c*) *Hales v. Freeman*, 1 Bing. & Brod. Rep. 391.

tator may not only in terms revoke a legacy he had before given, but such intention may be also indicated by particular acts (*a*): As where a father makes a provision for a child by his will, and afterwards gives to such child, if a daughter, a portion in marriage: or if a son, a sum of money, to establish him in life, provided such portion, or sum of money be equal to or greater than the legacy, this is an implied ademption of it, for the law will not intend that the father designed two portions for the same child (*b*). But this [330] implication will not arise if the provision in the will is created by bequest of the residue (*c*); nor if the provision in the father's lifetime be subject to a contingency (*d*); nor unless it be *ejusdem generis* with the legacy (*e*); nor if it be expressly in satisfaction of a claim *aliunde*; nor if the portion be given absolutely, and the legacy under limitations (*f*); nor if the testator were a stranger (*g*); nor if the testator be the uncle of the legatee (*h*); nor if the legatee be an illegitimate child, unless the testator placed himself clearly *in loco parentis* (*i*); and the doctrine of ademption of legacies is fully considered as confined to the cases of parents, and persons placing themselves *in loco parentis*; and such implication is always liable to be repelled by evidence (*k*). But if the testator, by a codicil subsequent to the portioning or advancement of the child, ratify and confirm his will, this, although a new publication, shall not avail to overturn the presumption, that he meant to adeem the legacy; for such words are merely formal (*l*). A gift by a parent in his lifetime to legatees, after a will giving them legacies, has been held to be part satisfaction of the legacies, upon evidence of the intention of the testator to that effect.

In respect to the ademption of a legacy, all the cases on the subject concur in the principle, that the intention of the testator must govern; but, in the application of that principle, or what shall amount to evidence of such an intention, they are, in many instances, incapable of being reconciled.

Thus, in some cases it has been held, that where a sum of money is bequeathed out of a particular fund, such legacy is in its nature

(*a*) 2 Fonbl. 353.

(*b*) 2 Fonbl. 354. note A. Hartop v. Whitmore, 1 P. Wms. 680. 2 Ch. Rep. 85. Jenkins v. Powell, 2 Vern. 115. Duffield v. Smith, 2 Vern. 257. Ward v. Lant, Prec. Ch. 183. Farnham v. Phillips, 2 Atk. 216. Watson v. Earl Lincoln, Ambl. 325. Ellison v. Cookson, 2 Bro. Ch. Rep. 307. S. C. 3 Bro. Ch. Rep. 61. Cookson v. Ellison, 2 Cox's Rep. 220. Hartop v. Hartop, 17 Ves. 184.

(*c*) Farnham v. Phillips, 2 Atk. 216.

(*d*) Spinks v. Robins, 2 Atk. 491.

(*e*) Grace v. Earl of Salisbury, 1 Bro. Ch. Rep. 425.

(*f*) Baugh v. Reed, 3 Bro. Ch. Rep. 192. Bell v. Coleman, 5 Madd. Rep. 22.

(*g*) Shudall v. Jekyll, 2 Atk. 516. Powell v. Cleaver, 2 Bro. Ch. Rep. 499.

(*h*) Brown v. Peck, 1 Eden's Rep. 140.

(*i*) Wetherby v. Dixon, Coop. Rep. 279. S. C. 19 Ves. 407. and see ex parte Dubost, 18 Ves. 140.

(*k*) Shudall v. Jekyll, 2 Atk. 516. Debeze v. Mann, 2 Bro. Ch. Rep. 165. 519. S. C. 1 Cox's Rep. 346.

(*l*) Iród v. Hurst, 2 Freem. 224. Thelluson v. Woodford, 4 Madd. Rep. 421.

[331] general, a *legatum in numeratis*, and if the testator in his lifetime receive it, it must be made good to the legatee out of the general assets; for from that act of the testator no presumption can be raised of his intention to revoke his bounty (*m*). (1) In other cases it has been decided, that such a legacy under the same circumstances is adeemed (*n*). Some authorities distinguish between the bequest of a sum of money to be satisfied out of a particular fund, and, consequently, a general legacy, and a bequest of a specific debt; that the former is not adeemed, while the latter is adeemed by payment to the testator (*o*). But these last mentioned cases differ in their construction of what shall be the bequest of a general legacy, as opposed to that of a specific debt. Some, as we have already seen (*p*), adopt a distinction between the bequest of a certain sum of money due from a particular person, as "five hundred pounds due on a bond from A.;" and a bequest of such debt generally, as, "of the bond from A.;" that, in the former instance, the legacy is pecuniary, in the latter is specific (*q*). But, according to other cases, this distinction is too slender to be relied on (*r*). A difference has also, in some instances, been taken between a compulsory, and a voluntary payment to the testator of such debt; in [332] other words, where the testator himself calls in a debt which he has bequeathed, and where the debtor unprovoked, and without application, thinks fit to pay it; that, in the former instance, it is the act of the testator, and, consequently, an ademption; in the latter he is merely passive, and therefore cannot be presumed to have changed his mind (*s*). But the doctrine of some cases is, that this distinction has no weight (*t*); and of others, that it has no existence (*u*), and that the case is not varied by the mode of payment. In another class of cases this distinction between a compulsory and a voluntary payment has been recognised as very important, but not as an absolute rule of decision; on the principle, that the testator's calling for payment is not of itself sufficient evidence of an intention to adeem, but an equivocal act requiring explanation (*v*).

(*m*) 4 Bac. Abr. 355. Ashburner v. Macguire, 2 Bro. Ch. Rep. 108. Finch. 152. Pawlet's case, Raym. 335. Savile v. Blacket, 1 P. Wms. 777.

(*n*) Badrick v. Stephens, 3 Bro. Ch. Rep. 431. See also 2 Fonbl. 367. note (f).

(*o*) Hambling v. Lister, Ambl. 401.

(*p*) Vid. *supr.* 303.

(*q*) Rider v. Wager, 2 P. Wms. 330. and note 1. *ibid.* Attorney-General v. Parkin, Ambl. 566. Carteret v. Lord Carteret, cited 2 Bro. Ch. Rep. 114. and see Le Grice v. Finch, 3 Meri. Rep. 50.

(*r*) Ashburner v. Macguire, 2 Bro.

Ch. Rep. 111. 1 Eq. Ca. Abr. 302.

(*s*) Crokat v. Crokat, 2 P. Wms. 165. 330. note 1. *ibid.* Bronsdon v. Winter, Ambl. 57.

(*t*) Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461. Ashton v. Ashton, 3 P. Wms. 386. S. C. 2 P. Wms. 469. Ford v. Fluming, 2 Str. 823.

(*u*) Attorney-General v. Parkin, Ambl. 566. Ashburner v. Macguire, 2 Bro. Ch. Rep. 109. 4 Bac. Abr. 355. note (B). Stanley v. Potter, 2 Cox's Rep. 180.

(*v*) Drinkwater v. Falconer, 2 Ves. 623. Hambling v. Lister, Ambl. 401. Coleman v. Coleman, 2 Ves. jun. 639.

It is, however, clear that if the legacy be of a specific chattel, and the testator alter the form, so as to alter the specification of the subject; as if, after having given a gold chain by his will, he convert it into a cup; or, after he has bequeathed wool, he make it into cloth, or a piece of cloth into a garment; the most obvious conclusion that can be formed from such an act is, that he has changed the intention he had expressed in his will; therefore, in such instances, the legacy shall be adeemed (*w*). (1) So, if he bequeath his stock in a particular fund, and sell it out subsequently to the making of the will, this, on the same principle, amounts to an ademption (*x*). And where a testator bequeathed two policies on a life upon certain trusts, and received the amount of the policies in his lifetime, it was held that the legacies were adeemed (*x*).—But if A. bequeath so much stock to B., and, after making his will, sell it out and then buy in again the same quantity of stock, this is no ademption: for if the selling of the stock is evidence of his having altered his intention, his buying it in again is evidence, equally strong, that he meant the legatee should have it (*y*). (2) If the testator, after such bequest of stock, sell out part and die, such sale shall be an ademption *pro tanto* (*z*). Thus, where A. bequeathed a moiety of two-thirds of the residue of the South Sea Stock, India, Bank, and Orphan Stock, Leases, East India and South Sea Bonds, and other his personal estate to B.; B. before he received this legacy made his will, and devised this moiety to trustees to sell and pay out of the same the sum of two hundred pounds to C. and the residue of the money to D.: afterwards B. and the legatee of the other moiety coming to an account with the executor of A., their respective shares were set out and received, and the stock and bonds were allotted to B., who sold part of them in his lifetime, but kept no account of the produce: this was decreed to be an ademption of the legacy to D. *pro tanto*: but it was held that B.'s receipt of his share was clearly no ademption; inasmuch as the [334] object both of B. and the other was merely to ascertain their moieties, and to prevent survivorship (*a*).

So it has been decided, that a bequest of a debt shall not be adeemed by the testator's having received dividends upon it under the bankruptcy of the debtor (*b*). But that such legatee is entitled to the dividends not received by the testator, and whatsoever may in future be payable out of the bankrupt's estate, in respect of that debt.

(*w*) 3 Bro. Ch. Rep. 110.

(*z*) Ca. Temp. Talb. 226.

(*x*) 3 Bro. Ch. Rep. 108. Barker v. Rayner, 5 Madd. Rep. 208.

(*a*) Birch v. Baker, Mos. 373.

(*y*) Partridge v. Partridge, Ca. Temp. Talb. 226.

(*b*) Ashburner v. Macguire, 2 Bro. Ch. Rep. 108.

(1) *Walton v. Walton*, 7 Johns. Cha. Rep. 262.

(2) So where a bequest was made of "all the money due on a bond against P. P. and J. P.," and after such bequest the testator, at the request of one of the obligees, accepted another bond in lieu of the first, it was held not to be an ademption of the legacy, which was specific. *Stout v. Hart*, 2 Halst. Rep. 414.

SECT. V.

Of cumulative legacies.

LEGACIES may be also cumulative : they are contradistinguished from such as are merely repeated. As where a testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both, or to one only. And on this point likewise the intention of the testator is the rule of construction (*a*). (1)

On this head there are three classes of cases ; first, those cases in which there is no evidence of such intention, either internal or extrinsic, one way or the other ; those cases where there is internal evidence ; and also those in which there is extrinsic evidence.

[335] In regard to the first, where there is neither internal or extrinsic evidence, it is necessary to recur to the rule of law (*b*). There are four instances of this class :

Where the same specific thing is bequeathed to A. twice in the same will, or in the will and again in a codicil : in that case he can claim the benefit only of one legacy, because it could be given no more than once (*c*).

Where the like quantity is bequeathed to him twice by one and the same instrument : there also he shall be entitled to one legacy only (*d*). So where an unconditional legacy was given by a third testamentary paper, it was held to be a substitution for a conditional legacy to the same amount, given by the first testamentary paper (*e*).

Where the bequest to him is of unequal quantities in the same instrument ; the one is not merged in the other, but he has a right to them both (*f*).

And, lastly, where the bequest to him is of equal, or unequal, quantities by different instruments : in that case also there shall be an accumulation (*g*).

There are likewise cases in which there is internal evidence of the testator's intention ; as where a latter codicil appears to be [336] merely a copy of the former with the addition of a single le-

(*a*) 4 Bac. Abr. 361. *Ridges v. Morrison*, 1 Bro. Ch. Rep. 389. *Coote v. Boyd*, 2 Bro. Ch. Rep. 527.

(*b*) *Hookey v. Hatton*, 1 Bro. Ch. Rep. 391, in note.

(*c*) 1 Bro. Ch. Rep. 392, in note, and *ibid.* 393.

(*d*) 1 Bro. Ch. Rep. 392, in note. *Swinb.* p. 7. s. 21. 1 Bro. Ch. Rep. 39, in note. 4 Bac. Abr. 361. *Masters v. Masters*, 1 P. Wms. 424.

(*e*) *Attorney-General v. Harley*, 4

Madd. Rep. 263. and see *Gillespie v. Alexander*, 2 Sim. & Stu. 145.

(*f*) 1 Bro. Ch. Rep. 392, in note. *Vid.* *Coote v. Boyd*, 2 Bro. Ch. Rep. 521.

(*g*) 1 Bro. Ch. Rep. 391, and 392, in note. *Masters v. Masters*, 1 P. Wms. 423. 1 Ch. Ca. 361. *Foy v. Foy*, 1 Cox's Rep. 163. *Baillie v. Butterfield*, *ibid.* 392. *Benyon v. Benyon*, 17 Ves. 34.

(1) See the doctrine fully stated, *De Witt v. Yates*, 10 Johns. Rep. 156.

gacy ; or where both legacies are given for the same cause ; they shall not be cumulative, whether given by the same or different instruments, as they shall be where one is given generally, and the other for an express purpose ; or where one reason is assigned for the former, and another for the latter ; or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money is given (*h*), or two annuities of the same amount, by different instruments, the one payable quarterly, the other half-yearly (*i*) ; or two annuities of different amounts, the one given by the will, payable out of real estate, the other by the codicil, payable out of personal estate (*k*). In like manner it may be collected from the context, whether the testator meant a duplication, or a mere repetition of the first bequest. And his intention has been inferred from very slight circumstances (*l*).

Extrinsic evidence is also admissible on this subject. Whether the testator by giving two legacies did, or did not, intend the legatee to take both, is a question of presumption, which will let in every species of proof (*m*). Hence, if the testator, after the making of the will, and before the date of the codicil, had an increase of fortune, that circumstance has been held to prove that he intended an additional bounty (*n*).

SECT. VI.

Of a legacy being in satisfaction of a debt.

UNDER certain circumstances, a legacy is regarded in the light [337] of a satisfaction of a debt. On this point also, the intention of the testator is the criterion (*a*).

It is a general rule, that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, shall be considered as a satisfaction of it (*b*). (1)

(*h*) *Masters v. Masters*, 1 P. Wms. 423.

(*i*) *Currie v. Pye*, 17 Ves. jun. 462.

(*k*) *Wright v. Lord Cadogan*, 2 Eden's Rep. 239.

(*l*) 4 Bac. Abr. 361. *Duke of St. Alban's v. Beauclerk*, 2 Atk. 640. *Ridges v. Morrison*, 1 Bro. Ch. Rep. 389. *Coote v. Boyd*, 2 Bro. Ch. Rep. 521. 1 P. Wms. 424, in note 2. *Benyon v. Benyon*, 17 Ves. jun. 34.

(*m*) *Coote v. Boyd*, 2 Bro. Ch. Rep.

527, 528. 4 Bac. Abr. 361, in note.

(*n*) *Masters v. Masters*, 1 P. Wms. 424.

(*a*) 4 Bac. Abr. 362. *Cuthbert v. Peacock*, 1 Salk. 155. pl. 5. *Cranmer's case*, 2 Salk. 508. 2 Fonbl. 332.

(*b*) 1 P. Wms. 409, note 1. *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394. *Jeffe v. Wooff*, 2 P. Wms. 132. *Fowler v. Fowler*, 3 P. Wms. 353. *Reech v. Kennegal*, 1 Ves. 126. Vid. *Crompton v. Sale*, 2 P. Wms. 555.

(1) *Williams v. Crary*, 8 Cow. Rep. 246. But a devise of lands to a creditor, though it be greater in value than the amount of the debt, does not extinguish a debt or claim which he has against the testator. *Partridge's Adm. v. Partridge*, 2 Harr. & Johns. 63.

But this is merely a rule of construction, and the courts in a variety of instances have denied the application of it, where they have been able to collect from the will circumstances to repel the presumption (*c*): As where it contains an express direction for the payment of debts (*d*), (1) or if the legacy be less than the debt, it has been held not to go in discharge, nor even in diminution of it (*e*). (2)

Nor shall the legacy be a satisfaction if it be conditional, or given on a contingency, for it shall not be supposed, that the testator intended an uncertain recompence in satisfaction of a certain demand (*f*). Nor is a legacy considered as a satisfaction, where it is not equally beneficial with the debt in one respect, though it may be more so in another; as, where the legacy is to a greater amount, [338] but the payment of it is postponed for however short a period (*g*): nor shall a legacy be held to be in satisfaction of a covenant, unless it be equally beneficial in amount, certainty, and time of enjoyment, with the thing contracted for (*h*).

Nor if the debt were on an open or running account, so that the testator could not tell whether the balance was in favour of the legatee or not (*i*). (3) Nor if the debt were contracted after the making of the will in which the legacy is given, shall he be supposed to have had it in contemplation to satisfy a debt which was not then in existence (*k*).

Parol declarations by the testator are admissible in evidence, to repel the presumption of the satisfaction of a debt, by the bequest

(*c*) 1 P. Wms. 409, note 1.

(*d*) *Chancey's case*, 1 P. Wms. 410. *Richardson v. Greese*, 3 Atk. 66, 68. *sed vid. Gaynor v. Wood*, at the Rolls, cited 1 P. Wms. 409, note 1, and 4 Bac. Abr. 428.

(*e*) *Cranmer's case*, 2 Salk. 508. *Hawes v. Warner*, 2 Vern. 478. *Eastwood v. Vinke*, 2 P. Wms. 616. *Mimuel v. Sazarine*, Mos. 295.

(*f*) 2 Foul. 331. *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394. *Cranmer's case*, 2 Salk. 508. *Nicholls v. Judson*, 2 Atk. 300. *Spinks v. Robins*, ib. 491. *Crompton v. Sale*, 2 P. Wms. 555. *Barret v. Beckford*, 1 Ves. 519.

(*g*) *Atkinson v. Webb*, Prec. Ch.

236. *Hawes v. Warner*, 2 Vern. 478. *Nicholls v. Judson*, 2 Atk. 300. *Clark v. Sewell*, 3 Atk. 96. *Hayes v. Mico*, 1 Bro. Ch. Rep. 129. *Jencock v. Falkener*, ib. 295. 2 Foul. 331, note M. *Mathews v. Mathews*, 2 Ves. 635. 1 P. Wms. 409, note 1.

(*h*) *Blandy v. Wedmore*, 1 P. Wms. 324, 409, note 1. *Eastwood v. Vinke*, 2 P. Wms. 611. 2 Foul. 332, note G.

(*i*) *Rawlins v. Powell*, 1 P. Wms. 299.

(*k*) 2 Foul. 331, 332. 2 Salk. 508. *Chancey's case*, 1 P. Wms. 409. *Thomas v. Bennet*, 2 P. Wms. 343. *Fowler v. Fowler*, 3 P. Wms. 353.

(1) Such express direction is of no moment in *Pennsylvania*. 3 Serg. & Rawle, 61.

(2) *Strong v. Williams*, 12 Mass. Rep. 391. *Byrne v. Byrne*, 5 Serg. & Rawle, 54. *Owings' Ex. v. Owings*, 1 Harr. & Gill's Rep. 184.

(3) *Williams v. Cray*, 5 Cow. Rep. 368. But it was subsequently ruled in this case, that where the legacy appears, either from the face of the will, or by evidence *aliunde*, to be intended by the testator as a satisfaction, it will so operate, though the sum bequeathed stand in an unliquidated account. *Williams v. Cray*, 8 Cow. Rep. 246.

of a legacy of greater amount, even where such declarations were not contemporaneous with, but subsequent to the making of the will; (1) and although the expressions in the will may afford an inference in favor of the presumption (1).

But in all cases the legacy shall be construed as a satisfaction, in case there be a deficiency of assets.

Where a legacy is decreed to be in satisfaction of a debt, the court always gives interest from the testator's death (m).

On the other hand, if a legacy be left to the testator's debtor, the debt shall be deducted from the legacy, for the legatee's demand is in respect of the testator's assets, without which the executor is not liable, and therefore the legatee in such case is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied *pro tanto*; for there can be no pretence to say, that because the testator gives a legacy to his debtor, that this is an argument to evidence that the testator meant to remit the debt. So under certain circumstances, money or goods lent or delivered by the executor to such legatee, was held by the court to be in part payment of the legacy (n).

If the testator bequeath to his debtor the debt, this being no more than a release by will, operates, as we have seen (o), only as a legacy; and is assets, subject to the payment of the testator's debts (p).

Where a legacy was left to the wife of A., who was largely indebted to the testatrix, and A. became a bankrupt, and his wife afterwards died without having asserted any claim in respect of the legacy and the assignees claimed it, it was held, that the executors of the testatrix were entitled to retain the legacy in part discharge of the debt due to the testatrix (q).

[339] SECT. VII.

Of the abatement of legacies,—of the refunding of legacies,—of the residuum.

IN case the estate be sufficient to answer the debts and specific legacies, but not the general legacies, they are subject to abatement, and that in equal proportions; but in such case nothing shall be abated from specific legacies (a).

Nor shall a sum of money bequeathed by the testator, in satisfac-

(1) Wallace v. Pomfret, 11 Ves. jun. 542. Sed vid. 3 P. Wms. 354.

(m) Clark v. Sewell, 3 Atk. 99.

(n) Jeffs v. Wood, 2 P. Wms. 128.

(o) Supr. 308.

(p) Rider v. Wager, 2 P. Wms. 332.

(q) Ranking v. Barnard, 5 Madd. Rep. 32.

(a) 2 Fonbl. 374. 2 Bl. Com. 513.

Clifton v. Burt, 1 P. Wms. 679.

(1) Williams v. Crary, 8 Cow. Rep. 246.

tion or recompence of an injury done by him, abate any more than a specific legacy (*b*). But a legacy, although devised to be paid in the first place, shall abate, if the fund be insufficient for the legacies (*c*), unless, perhaps, it be a provision for a wife (*d*). (1) So a devise of a personal annuity is not, as we have seen (*e*), a specific legacy, but a legacy of quantity, and liable to abate accordingly (*f*). (2)

If A. devise specific and pecuniary legacies, and direct by the will that such pecuniary legacies shall come out of all his personal estate, if there be no other personal estate than the specific legacies, [340] they must be intended to be subject to those which are pecuniary, otherwise the bequest to the pecuniary legatees would be altogether nugatory (*g*). So a legacy in favour of a charity, although preferred by the civil law, shall by our law abate equally with other general legacies (*h*). So a legacy to servants shall abate in the same manner (*i*).

But where a legacy of 200*l.* was bequeathed for building a monument for the testatrix's mother, from whom the testatrix derived the greatest part of her estate, it was decreed, that being a debt of piety, it should not abate with the other legacies (*k*). So where 3*l.* were given to the poor of three several parishes, it was considered by the Court as part of the funeral and as doles of the funeral, and therefore held that no abatement ought to be made out of them (*l*). And where the testator, after giving various legacies, expressed at the end of his will his apprehension that there would be a considerable surplus of his personal estate beyond what he had before given away in legacies, for which reason he gave several further legacies; and afterwards, by a codicil, he gave several other legacies. It was decreed, that the subsequent legacies given by the will having been given in a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies given at the end of the will should be

(*b*) 2 Fonbl. 377.

(*c*) 2 Fonbl. 378. *Brown v. Allen*, 1 Vern. 31. *Beeston v. Booth*, 4 Madd. Rep. 161.

(*d*) *Lewin v. Lewin*, 2 Vcz. 417.

(*e*) Vid. *supr.* 303.

(*f*) *Hume v. Edwards*, 3 Atk. 693. *Lewin v. Lewin*, 2 Vcz. 417. Sed vid. *Peacock v. Monk*, 1 Vez. 133.

(*g*) *Sayer v. Sayer*, Prec. Ch. 393. 2 Fonbl. 377, 378.

(*h*) *Jennor v. Harper*, Prec. Ch. 360.

Tate v. Austen, 1 P. Wms. 265. *Masters v. Masters*, 422. *Earl of Thomond v. Earl of Suffolk*, 462. *Attorney-General v. Hudson*, 675. *Attorney-General v. Robins*, 2 P. Wms. 25. 296.

(*i*) *Attorney-General v. Robins*, 2 P. Wms. 25.

(*k*) *Masters v. Masters*, 1 P. Wms. 423.

(*l*) *Attorney-General v. Robins*, 2 P. Wms. 25.

(1) *Stuart v. Carson's Ex.* 1 Desaus. Rep. 500. See, however, *Jett, Ex. v. Bernard*, 3 Call's Rep. 11.

(2) A bequest of "twenty negroes," not designated by name, is a specific legacy of the second description, and liable to abate with pecuniary legacies. *Warren v. Wigfull*, 3 Desaus. Rep. 47.

lost. That the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil, and, therefore, unless the inference can be repelled, the legacies by the codicil must be lost also (*m*).

In case of a deficiency of general assets, that is to say, of assets to pay debts, specific legacies, although not liable to abate with the general legacies, must abate in proportion among themselves (*n*).

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase money, which was directed by the will to be paid by the executor, a rateable contribution was decreed, as between the devisee of the estate and the legatees and annuitants under the will (*o*).

We have before seen (*p*) that a testator may carve specific legacies out of a specific chattel; now, in such case, if the chattel so parcelled out prove deficient, such specific legacies must abate proportionally amongst themselves (*q*).

And in a devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7,800*l.*, and the overplus moneys arising from the sale to A., it was held a specific legacy of 10,000*l.*, and the sale producing less, that A. and the others should abate (*r*).

Such is the advantage to which a specific legatee is entitled, that he should not contribute with the other legatees in case of a deficiency. But, on the other hand, he is subject to a risk; as, for example, if such specific legacy be a lease, and there be an eviction; or if goods, they be mislaid or burnt; or if a debt, it be lost by the insolvency of the debtor: in all these instances such specific legatees shall receive no contribution (*s*).

[341] On the same principle, legatees in certain circumstances are bound to refund their legacies, or a rateable part of them, as in all cases of a deficiency of assets for the payment of debts (*t*). If the fund be merely insufficient to pay the legacies, and the executor pay one of the legatees, a distinction is to be remarked between cases, where such payment was voluntary, and where it was compulsory; and also between cases in which the assets were originally deficient, and where they became so by his subsequent misapplication of them. If the executor paid the legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. The legatee, who has been paid, is subject to no claim on the part of the other legatees (*u*);

(*m*) Ibid. 23.

(*n*) 2 Fonbl. 377. note (q). Duke of Devon v. Atkins, 2 P. Wms. 382. Long v. Short, 1 P. Wms. 403. Webb v. Webb, 2 Vern. 111.

(*o*) Headley v. Redhead, Coop. Rep. 50.

(*p*) Vid. sup. 302.

(*q*) Sleech v. Thorington, 2 Vez. 563.

(*r*) Page v. Leapingwell, 18 Ves. 463.

(*s*) Hinton v. Pinke, 1 P. Wms. 540.

(*t*) 2 Bl. Com. 513. Noel v. Robinson, 1 Vern. 94. Hodges v. Waddington, 2 Ventr. 360.

(*u*) Orr v. Kaines, 2 Vez. 194. Newman v. Barton, 2 Vern. 205.

provided, according to some authorities (*v*), the executor be solvent ; but if the executor prove insolvent, so that there are no other means of redress, a court of equity will entertain a bill to compel such legatee to refund.

In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. And, even if such legatee obtain a decree for his legacy, and be paid, the other legatees may oblige him to refund in the same manner. But if the executor had at first enough to pay all the legacies, and, by his subsequent wasting of the assets, they become deficient, in that case [342] such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence in preference to the other legatees, who neglected to institute their suit in time ; by which they might have secured to themselves the same advantage (*w*). (1)

Nor is a legatee bound to refund at the suit of the executor, unless the payment by him were compulsory (*x*) ; or unless the deficiency were created by debts which did not appear till after the payment of the legacy (*y*) : in either of which cases, the executor, as well as a creditor, may compel the legatee to refund the legacy ; for an executor who pays a debt out of his own purse stands in the place of a creditor, and has the same equity as against such legatee (*z*). (2)

When the executor has paid all the debts, and all the legacies

(*v*) *Orr v. Kaines*, 2 Vez. 194.

(*y*) *Neithrop v. Hill*, 1 Ch. Ca. 136.

(*w*) 1 P. Wms. 495. note 1. *Edwards v. Freeman*, 2 P. Wms. 446.

(*z*) 4 Bac. Abr. 428. *Vin. Abr. tit. Devise*, (Q d.)

(*x*) *Newman v. Barton*, 2 Vern. 205.

(1) *Lupton v. Lupton*, 2 Johns. Cha. Rep. 614.

(2) By the 4th section of the Act of 21st March, 1772, (Purd. Dig. 518. 1 Dall. Laws, 631. 1 Sm. Laws, 383.) it is provided, "that no suit shall be maintained for any legacy, until reasonable demand made of the executor or executors, administrator or administrators with wills annexed, who ought to pay the same, and an offer made of two sufficient surties to the said executor or executors, administrator or administrators aforesaid, who, if they think proper to accept thereof, shall become bound to them, the said executor or executors, administrator or administrators aforesaid, in double the sum of the legacy given, where such legacy is ascertained by the will, and where not ascertained as aforesaid, in double such sum as the person or persons shall think him, her or themselves justly entitled to, with condition underwritten, that if any part, or the whole thereof, shall, at any time after, appear to be wanting to discharge any debt or debts, legacy or legacies, which the said executor or executors, administrator or administrators shall not have other assets to pay, that then he the said legatee shall return his said legacy, or such part thereof as shall be necessary for the payment of the said debts, or the payment of a proportional part of the said legacies. And if the said executors or administrators shall not think proper to accept of such bond, then the said legatee shall file the same with the clerk of the court, before obtaining any process against the executor or executors, administrator or administrators; otherwise, and in default thereof, the process issued shall abate." See *Walden's Ex. v. Payne*, 2 Wash. Rep. 1. *Laurason v. Davenport*, 2 Call's Rep. 95. *Stocall's Ex. v. Woodson*, 2 Munf. 303. *Sheppard's Ex. v. Stark*, 3 Munf. Rep. 29. *Rootes v. Webb*, 4 Munf. 77.

above-mentioned, pecuniary and specific, he must in the last place pay over the surplus or residuum to the residuary legatee (*a*). And although the residuary legatee die before payment of the debts, and before the amount of the surplus is ascertained, yet it shall devolve on his representative (*b*).

The residue, generally speaking, comprehends such legacies as have lapsed (*c*); but the testator may by the terms of the will so [343] circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue: as where A. on board a ship made his will, and gave to his mother, if alive, his gold rings, buttons, and chests of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his will was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was held that A.'s executor was legatee of a particular residue, namely, of what the testator had on board the ship, and such legacy excluded him from the general residue. But that as A.'s mother died in his lifetime, his rings, buttons, and chests of clothes lapsed into such particular residue, and devolved on his executor, not as executor, but as legatee of such particular residue (*d*).

If the residuary estate be devised to A. B. and C. in joint tenancy, if A. die in the lifetime of the testator, or if A. die after the testator, but before severance of the joint tenancy in the residue, it shall survive to the two others (*e*). But if it be given to A. B. and C. as tenants in common, on the death of one of them in the lifetime of the testator, his share shall not go to the survivors, but shall devolve on the testator's next of kin, according to the statute of distribution, as so much of the personal estate remaining undisposed of by the will (*f*).

So if a third of the residuum be devised to each of three persons, and one of them die in the testator's lifetime (*g*); (1) or if the devise be revoked as to one of such residuary legatees, the consequence shall be the same (*h*).

If A. bequeath all the surplus of his personal estate after payment of the debts and legacies, to J. S., and several creditors, although barred by the statute of limitations, commence actions against the

(*a*) 2 Bl. Com. 514. 4 Bac. Abr. 428.

(*b*) *Brown v. Farndell*, Carth. 52.

(*c*) *Jackson v. Kelly*, 2 Vez. 285.

(*d*) *Cook v. Oakley*, 1 P. Wms. 302.

(*e*) *Webster v. Webster*, 2 P. Wms.

(*f*) *Bagwell v. Dry*, 1 P. Wms. 700.

Cray v. Willis, 2 P. Wms. 529.

(*g*) *Bagwell v. Dry*, 1 P. Wms. 700.

Page v. Page, 2 P. Wms. 488.

(*h*) 6 Bro. P. C. 1.

executor, on his refusal to plead the statute, equity will not, in favour of such residuary legatee, compel him to plead it (*i*).

It is a general rule, that where a question arises between a legatee, or a party entitled to a portion, and the residuary legatee, the costs shall come out of the residue ; yet if no question arise between such individual and the residuary legatee, but the question relate merely to the nature of the interest of the property severed from the general mass of the estate, the costs of originating that question are thrown on the specific property itself : as where the testator directed his executors to purchase 92*l.* per annum Bank Long Annuities, in trust for his sister for life, and after her decease, the principal to be distributed among certain persons, and the executors purchased the long annuities accordingly, and invested the same in their names, and after a lapse of 17 years the tenant for life died, when a question arose in respect of the nature of the interest, which had been so long separated from the residuary estate. Lord Eldon, C. on appeal from the Rolls, held, that the costs of the suit relative to the trust fund, the right to which was in question in the cause, should be paid out of the same : and that his Honour's decree, directing that the costs should be paid out of the testator's general estate, should in that particular be varied (*k*).

[344] If there be no residue, the residuary legatee has a claim to nothing. In no case shall he compel the other legatees to abate, for although this consideration might occasionally meet the testator's intention, yet it would in most instances, lead to great confusion and embarrassment (*l*). But it has been held, that if the executor be guilty of a *devastavit*, the residuary legatee shall not suffer exclusively ; but on a deficiency of assets in consequence of such misconduct, shall come in *pari passu* with the other legatees. Yet according to that decision, the Court had it not in contemplation to afford the residuary legatee relief in case the testator had spent the residue in his lifetime ; for the inquiry directed was not what personal estate the testator had at the time of making his will, but what estate he had at his death (*m*).

SECT. VIII.

Of an executor's being legatee ; and herein of his assent to his own legacy.

IN case of a legacy bequeathed to the executor, if he take posses-

(*i*) 4 Bac. Abr. 429. 1 Eq. Ca. Abr. 562.

309. 11 Vin. Abr. 269. Lord Castle-

ton v. Lord Fanshaw, Prec. Chan. 100.

Ex parte Dewdney, 15 Ves. jun. 498.

(*k*) Jenour v. Jenour, 10 Ves. jun.

(*l*) Fonnereau v. Poyntz, 1 Bro. Ch. Rep. 478. 1 P. Wms. 306. note 2.

(*m*) 1 P. Wms. 305 & 306, note 1 and 2.

sion of it generally, he shall hold it as executor, which is his first and general authority (*a*).

[345] The union of the two characters of executor and legatee, in one and the same person, makes no difference (*b*). His assent is as necessary to a legacy vesting in him in the capacity of legatee, as to a legacy's vesting in any other person, and that on the same principle. Till he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy; or whether it must not of necessity be applied in satisfaction of debts (*c*).

His assent to his own legacy may, as well as his assent to that of another legatee, be either express or implied. He may not only in positive terms announce his election to take it as a bequest, but such election may also be implied from his language, or his conduct (*d*). As if he say, that he will have it according to the will, that amounts to an assent to have it as legatee (*e*). So, if a term be devised to A. the executor for life, and afterwards to B., if he say that B. will have it after him, that implies an election to take it as legatee (*f*). So if by deed reciting that he has a term for years by devise, he grants it over (*g*); or if he take the profits of it to his own use (*h*); or if he repair the tenements devised at his own expence (*i*); all these acts indicate an assent to the bequest: in like manner, if he perform a condition or trust annexed to the devise; as, if a lessee [346] for years devise his term to his executor, on condition that he shall pay ten pounds to J. S., which he pays accordingly: this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing claims the benefit which is annexed to it (*k*). So, if a lease be devised to an executor during the minority of the testator's son, in order that the executor may educate him out of the profits, if he educate him accordingly, this constitutes an assent to take the lease by way of legacy, and not as executor (*l*); or if he excludes a co-executor from a joint occupancy of the term with him (*m*), that is also an agreement to the legacy. An assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character (*n*).

But till the executor has made his election, either express or implied, he shall take the legacy as executor, though all the debts have been paid, independently of such bequest (*o*).

(*a*) 3 Bac. Abr. 84. 13 Co. 47. Plowd. 520. 543. 10 Co. 47 b. Dyer,

277 b. Young v. Holmes, Stra. 70.

(*b*) Off. Ex. 22.

(*c*) Ibid. 27. 2.

(*d*) Com. Dig. Admon. C. 6. 7. Garret v. Lister, 1 Lev. 25.

(*e*) Garret v. Lister, 1 Lev. 25.

(*f*) Garret v. Lister, 1 Lev. 25.

(*g*) 1 Roll. Abr. 920.

(*h*) Ibid. 619.

(*i*) Semb. Cheney's case, 1 Leon. 216.

(*k*) Plowd. 544.

(*l*) Ibid. 539.

(*m*) Dyer, 277 b.

(*n*) 2 Roll. Rep. 158

(*o*) Com. Dig. Admon. C. 5. 4 Leon. 216.

Nor is the entry of an executor, whether before or after probate, on the term devised to him, an election to take it as legatee (*p*). Nor, if he merely say, that the testator left all to him (*q*), will so ambiguous an expression have that effect. Yet if an executor being [347] also devisee of a term, grant a lease of it by the name of executor, that amounts to a claim in such capacity (*r*).

If a legacy be left to A. as executor, whether expressly for his care and trouble, or not, he must prove the will (*s*), (1) and either act, or distinctly shew his intention to act, before he shall become entitled to it (*t*). And although an executor prove the will, yet if he do not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy (*u*).

Where however a testator named two persons to be his executors, and gave them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words, "I give to my cousin J. K. 50*l.* whom I appoint joint executor," and the testator also gave to J. K.'s sisters, legacies of 50*l.* each: it was held, that the legacy to J. K. was not annexed to the office of executor, and that he was entitled to it, although he had declined to act in the trusts of the will (*v*). (2)

Nor has an executor a right to give himself a preference in regard to a legacy, as in the instance of a debt.

In the case of a legacy to a trustee, given as a token of regard and recompence for his trouble, payable within twelve calendar months, after the decease of the testatrix, no refusal or neglect to act where necessary appearing, and the trustee dying nineteen months after the testatrix without having acted, the trustee was held entitled to the legacy (*w*).

The rules above stated in respect to the abatement and refunding of legacies, in the case of legatees in general, apply equally to the case where the same person is both executor and legatee (*x*), and although the bequest was merely as a recompence for his executing the trust (*y*).

(*p*) Com. Dig. Admon. C. 7. Off. Ex. 226.

(*q*) 1 Roll. Abr. 620.

(*r*) 1 Leon. 216.

(*s*) Reed v. Devaynes, 2 Cox's Rep. 285.

(*t*) Reed v. Devaynes, 3 Bro. Ch. Rep. 95. Abbot v. Massie, 3 Ves. jun. 148. Harrison v. Rowley, 4 Ves. jun. 212. Stackpoole v. Howell, 13 Ves. jun. 417.

(*u*) Harford v. Browning, 1 Cox's Rep. 302. Freeman v. Fairlie, 3 Meriv. Rep. 31.

(*v*) Dix v. Reed, 1 Sim. & Stu. 237.

(*w*) Brydges v. Wotton, 1 Ves. and Bea. 154.

(*x*) 2 Bl. Com. 502. Plowd. 545, in note.

(*y*) 4 Bac. Abr. 417. • Fretwell v. Stacy, 2 Vern. 434. Attorney-General v. Robins, 2 P. Wms. 25.

(1) *Rothmaler's Adm. v. Myers, Ex.* 4 Desaus. Rep. 215.

(2) So a legacy given to an executor as *nephew* of the testator—he is entitled to the legacy, though he renounce the executorship. *Granberry v. Granberrys*, 1 Wash. Rep. 216.

SECT. IX.

Of the testator's appointing his debtor executor—when the debt shall be regarded as a specific bequest to him—when not.

IF a creditor appoint the debtor his executor, the effect of such an appointment is to be considered, first at law, and then in equity. In point of law, such nomination shall operate as a release, and extinguishment of the debt; (1) on the principle that a debt is merely [348] a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office discharges the action, and, consequently, discharges the legal remedy for the debt (*a*). Thus, if the obligee of a bond make the obligor executor, this amounts to a release at law of the debt (*b*): If several obligors be bound jointly and severally, and the obligee constitute one of them his executor, it is an extinguishment of the debt at law, and the executor is incapable of suing the other obligors (*c*). The debt is in like manner released where only one of several executors is indebted to the testator, for one executor cannot maintain an action against another (*d*); and after the death of such executor, the surviving executors cannot sue his representative for the debt (*e*). (2) Nor is the case varied by the executor's dying without having proved the will, or having administered (*f*), or even by his refusal to act with his co-executors (*g*), unless he formally renounced the office in the spiritual court: such a renunciation, indeed, shall prevent the release of his debt: for he

(*a*) 3 Bac. Abr. 11. 2 Bl. Com. 511, 512. Off. Ex. 31. Wankford v. Wankford, Salk. 299. Plowd. 186. Com. Dig. Admon. B. 5. Roll. Abr. 920, 921. 5 Co. 30. Harg. Co. Litt. 264 b. note 1.

(*b*) 8 Co. 136.

(*c*) Off. Ex. 31. 11 Vin. Abr. 398.

(*d*) Ibid. 31.

(*e*) Ibid. 32. Plowd. 264. Crossman's case, Leon. 320.

(*f*) Wankford v. Wankford, Salk. 300. Plowd. 184. Off. Ex. 31.

(*g*) Wankford v. Wankford, Salk. 308.

(1) *Pusey v. Clemson*, 9 Serg. & Rawle, 208. *Stevens, Adm. v. Gaylord*, 11 Mass. Rep. 266.

(2) By the second section of the Act of April 3d, 1829, (Pamph. Laws, 122.) it is provided, "that in all cases where a creditor hath appointed or shall appoint his judgment debtor his executor, and the said judgment is a lien on the real estate of such executor, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will; or where any testator, having a judgment situate as aforesaid, shall have creditors interested in preserving the lien of such judgment, that such legatee or creditors so interested in such judgment, may suggest their interest in the same upon the record thereof, and issue a writ of *scire facias* against the defendant to revive the same, and continue the lien thereof at any time when such proceedings shall be necessary under the laws of this commonwealth, which judgment so revived shall remain a lien for the use of all persons interested therein."

could no more be compelled to accept a release, than a deed of grant (*h*).

In all these cases the legal remedy is destroyed by the act of the party, and therefore, is for ever gone (*i*) ; but the effect is different [349] where it is suspended merely by the act of law (*k*) ; as if administration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant (*l*) : Thus, if the obligor of a bond administer to the obligee, and die, a creditor of the obligee having obtained administration *de bonis non*, may maintain an action for such debt against the executor of the obligor (*m*). So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act to discharge it, and the husband may pay it to the wife in the character of executrix. If he do not, the remedy is suspended merely by the legal effect of the coverture, and on her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any others outstanding (*n*). It seems also, that the naming of a debtor executor *durante minoritate* is no discharge of the debt, since he is only executor in trust for the infant till he comes of age (*o*).

In equity, the consequence of the testator's nominating his debtor executor is to be regarded, first, with reference to creditors ; and then, to legatees.

As against the testator's creditors, (1) equity will never permit him by constituting his debtor executor to disappoint them : Therefore, where the testator has not left a fund sufficient for the payment of his own debts, in that case, the debt of his executor shall be assets ; the duty remaining, although the action at law be gone, and the executor shall be liable to account for such debt in the spiritual court, or in a court of equity. It were highly unreasonable that the claims of creditors should be defeated by a release, which was absolutely voluntary (*p*). In respect to legatees, equity will, generally speaking, allow the appointment of a debtor executor [350] to operate as a discharge of his debt. For the debt is considered in the light of a specific bequest or legacy to the debtor, for the purpose of discharging the debt, and therefore, though like

(*h*) Wankford v. Wankford, Salk. 307.

(*i*) Dorchester v. Webb, Cro. Car. 373.

(*j*) Wankford v. Wankford, Salk. 302.

(*k*) Wankford v. Wankford, Salk. 303.

(*l*) Off. Ex. 32. 8 Co. 136.

(*m*) Lockier v. Smith, Sid. 79.

(*n*) Crosman's case, Leon. 320. Crosman v. Reade, Moore, 236. Wankford v. Wankford, Salk. 306.

(*o*) 11 Viner's Abr. 400. Caweth v. Philips, Lord Raym. 605.

(*p*) Wankford v. Wankford, Salk. 302, 306. Off. Ex. 31. 2 Bl. Com. 512. Plowd. 186. Shep. Touchs. 497, 498. Simmons v. Gutteridge, 13 Ves. 264.

(1) *Pusey v. Clemson*, 9 Serg. & Rawle, 264. *Wood v. Tullman and Woodward's Executors*, Cox's N. J. Rep. 153. *Stevens, Adm. v. Gaylord*, 11 Mass. Rep. 266.

all other legacies, it shall not be paid, or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees (*q*).

But this rule with reference to legatees, is subject to a great variety of exceptions. In equity such debt shall not be released, even as against legatees, (1) if the presumption arising from the appointment of a debtor to the executorship be contradicted by the express terms of the will : or by strong inference from its contents. As where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor ; such debt shall be assets to pay not merely that specific legacy, but all other legacies (*r*). In like manner, if he leave the executor a legacy, it is held to be a sufficient indication, that he did not mean to release the debt. And in such case, the executor shall be trustee to the amount of the debt for the residuary legatee, or next of kin (*s*). So where a testator bequeathed large legacies, and also the residue of his estate, to his executors, one of whom was indebted to him by bond in three thousand pounds, it was decreed that this debt should be added to the surplus, and that both executors were equally entitled to it (*t*). (2) So where a debtor to the testator was appointed executor, although without a legacy, yet it appearing by the tenor of the will, that the testator considered him in the light of a mere trustee of his whole property, his debt was clearly held not to be discharged (*u*). So where A. mortgaged his estate to B. who paid no money in consideration of the mortgage, but gave him a bond for 130*l*. and then A. died, having appointed B. his executor, the bond was decreed to be assets in the hands of B., and applicable, after payment of the funeral expences and legacies, to the exoneration of the real estate in favor of the heir (*w*).

[351] SECT. X.

Of the residue undisposed of by the will, when it shall go to the executor—when not.

IF the testator make no disposition of the residue, a question arises,

(*q*) 2 Bl. Com. 512. Harg. Co. Lit. 264 b. note 1.

(*r*) 3 Bac. Abr. 11. Flud v. Rumcey, Yelv. 160.

(*s*) Carey v. Goodinge, 3 Bro. Ch. Rep. 110.

(*t*) Brown v. Selwyn, Ca. Temp. Talbot, 240. 4 Bro. P. C. 180. 3 Bac. Abr. 12.

(*u*) Berry v. Usher, 11 Ves. jun. 87.

(*w*) Fox v. Fox, 1 Atk. 463.

(1) *Wood v. Tallman's Ex. et al.* Cox's N. J. Rep. 158.

(2) *Pusey v. Clemson*, 9 Serg. & Rawle, 204. See also *Fleming v. Bolling*, 3 Call, 75 ; *Hall v. Hall*, 2 M'Cord's Cha. Rep. 304 ; *Winship v. Buss*, 12 Mass. Rep. 199 ; cases in which the rule did not prevail as against residuary legatees, the debt due by the executor being held assets for their payment.

to whom it shall belong, and this is a subject which involves in it a great variety of distinctions (*a*).

The result of the numerous cases on this subject appears to be this :

The whole personal estate of the testator is, in point of law, devolved on the executor ; and if after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially.

If it shall appear on the face of the will, either expressly, or by sufficient implication, that the testator meant to confer upon him merely the office, and not the beneficial interest, equity will convert the executor into a trustee for those on whom the law [352] would have cast the residue in case of a complete intestacy ; that is to say, the next of kin. As, where the testator has styled him in his will an executor in trust, or has used other expressions of the same import (*b*). But an executor being called a trustee as to specific trusts imposed upon him distinct from his appointment as executor, will be entitled to the residue, as no inference can be drawn therefrom of the testator's intention to make him a trustee of the residue. And executors taking the residue, take it precisely in the same plight as residuary legatees would take it (*c*). Where the testator appointed the American ambassador his executor, or such other person as should be the American ambassador at the time of the testator's death, Sir William Grant, M. R. held that to be a circumstance connected with others indicative of an intention to confer upon him the office only, he being appointed not in his individual character and as a friend, but in the capacity of minister (*d*). So, where the testator has begun to make a disposition of the surplus, but has not proceeded to complete it, there also the executor shall be excluded. As where a residuary clause is inserted in the will, and the testator has omitted to name the residuary legatee (*e*). But a blank space between the last line of a will and the signature raises no presumption of an intention to dispose of the residue against the legal right of the executor (*f*). Where an executor has general and specific legacies, not expressly for his care and trouble, upon the evidence raising no direct intention in his favour, but mere inference from equivocal declarations, with an intention

(*a*) 1 P. Wms. 550. note 1. 2 Fonbl. 131, note (k). 3 Bac. Abr. 67. 11 Vin. Abr. 407.

(*b*) 1 P. Wms. 550. note 1. Pring v. Pring, 2 Vern. 99. Rachfield v. Careless, 2 P. Wms. 158. Graydon v. Hicks, 2 Atk. 18. Dean v. Dalton, 2 Bro. Ch. Rep. 634. Bennet v. Batchelor, 3 Bro. Ch. Rep. 28. Wheeler v. Sheer, Moseley, 288. Lockyer v. Simpson, 301. Bennet v. Batchelor, 1 Ves. jun. 63.

(*c*) Pratt v. Sladden, 14 Ves. jun. 123. Dawson v. Clark, 15 Ves. jun. 409. 13

Ves. jun. 247.

(*d*) Urquhart v. King, 7 Ves. jun. 230. See also Griffiths v. Hamilton, 12 Ves. jun. 309.

(*e*) 1 P. Wms. 550, note 1. Wheeler v. Sheer, Moseley, 288. Bp. of Cloyne v. Young, 2 Ves. 91. Lord North v. Purdon, 495. Hornsby v. Finch, 2 Ves. jun. 78. Vid. also Mordaunt v. Hussey, 4 Ves. jun. 117. and Giraud v. Hanbury, 3 Meri. Rep. 150.

(*f*) White v. Williams, 3 Ves. and Bea. 72. S. C. Coop. Rep. 58.

to make an express residuary disposition, the executor will be a trustee of the residue (*g*). So the executor shall be excluded where the residuary clause is rased and become illegible (*h*). Nor where the testator has regularly bequeathed the surplus, although the residuary legatee first die, and consequently it be undisposed of at the time of the testator's death, shall it belong to the executor (*i*). Nor shall the executor be entitled to it where the testator has given him a legacy expressly for his care and trouble ; for that is a strong case on which to raise a resulting trust, not merely on the absurdity of supposing a testator to give a part of the fund to that person for whom he intended the whole, but as it is evidence that he considered him as a trustee for some other, who should be the object of the care and trouble for which the bequest was meant as a compensation (*k*). Still, however, the principle, that it shall not be presumed to have been the testator's meaning thus to give part and [353] all to the executor, has been allowed alone and unaided to operate as an exclusion. Hence it is a settled rule in equity, that a pecuniary legacy bequeathed to an executor alone, or to an executor who is also a trustee, affords a sufficient argument to debar him of the residue (*l*). (1)

A direction in a will "to keep accounts," was held upon demurrer, to afford a presumption that the executrix was not meant to take beneficially ; but parol evidence being admitted on behalf of the executrix, to shew that she was intended to take the residue for her own benefit, and such evidence being satisfactory, the bill by the next of kin was dismissed (*m*).

A bequest, that the whole of the testator's property shall pass by his codicil "according to law," will exclude the executor, and make him a trustee for the next of kin (*n*). (2)

(*g*) *Langham v. Sandford*, 17 Ves. jun. 435. and on appeal, 19 Ves. 641. 2 Meri. Rep. 6.

(*h*) *Farrington v. Knightly*, 1 P. Wms. 549.

(*i*) 1 P. Wms. 550, note 1. *Nicholls v. Crisp*, Ambl. 769. *Bennet v. Batchelor*, 3 Bro. Ch. Rep. 28.

(*k*) 2 Fonbl. 131, note (k). *Bp. of Cloyne v. Young*, 2 Ves. 97. *Foster v. Munt*, 1 Vern. 473. *Rachfield v. Careless*, 2 P. Wms. 158. *Cordell v. Noden*, 2 Vern. 148. *Newstead v. Johnston*,

2 Atk. 46.

(*l*) 1 P. Wms. 550, note 1. 2 Fonbl. 131, note (k). *Ball v. Smith*, 2 Vern. 676. *Joslin v. Brewitt*, Bunb. 112. *Farrington v. Knightly*, 1 P. Wms. 544. *Davers v. Davers*, 3 P. Wms. 40. *Prec. Ch.* 107. *Gibbs v. Rumsey*, 2 Ves. and Bea. 294. *Bull v. Kingston*, 1 Meri. Rep. 314.

(*m*) *Gladding v. Yapp*, 5 Madd. Rep. 56.

(*n*) *Ld. Cranley v. Hale*, 14 Ves. jun. 307.

(1) Where there are several executors, and *unequal* legacies are given to them, they were not excluded from the residue in *Virginia* before the Act of 1785, c. 61. *Shelton v. Shelton's, Granberry's Ex. v. Granberry*, 1 Wash. Rep. 53. 246. *Dykes v. Woodhouse's Adm.* 3 Rand. Rep. 288.

(2) So where the testator ordered all the residue and remainder of his personal estate (except his dining table and two stoves) to be sold by public sale by his executors, or the survivor of them, as soon as might be after his decease, *to the best advantage*, it was held that this direction made them trustees for the next of kin. *Grasser v. Eckert*, 1 Binn. 575.

If the legacy to the executor be specific, it shall equally exclude him (*o*). Nor will the rule be varied by the testator's having bequeathed legacies to the next of kin (*p*). For it is founded rather on an implied intent to bar the executor, than to create a trust for the next of kin; and, therefore, if the executor have a legacy, and there be no next of kin, a trust shall result for the crown (*q*). It is also settled, that in case the widow of the testator be executrix, she is, in respect to the residue, precisely in the same situation as any other person appointed to the office (*r*); unless the bequest to her of a specific legacy, consisting of property which was hers before marriage, may vary the rule (*s*).

Executors entitled to the residue undisposed of will take a legacy to a charity void by the statute 9 *Geo. 2. c. 36.* for their own benefit, against the claim of the next of kin (*t*).

A general devise and bequest to executors, having equal legacies of stock, for mourning, their heirs, executors, &c., on the especial trust to devote all, both real and personal, to debts, legacies, and annuities, is a resulting trust of the residue for the heir at law and next of kin (*u*).

In respect to that class of cases in which the executor shall be entitled to the residue, although he be a legatee, it may be stated [354] as an universal rule, that wherever the legacy is consistent with the intent that the executor should take the whole, a court of equity will not disturb his legal right. And therefore, where a gift to an executor is only an exception out of another legacy; as if a library be bequeathed to A., out of which the executor is to select ten books for himself; it shall not exclude him from the residue, inasmuch as it was necessary to make an express exception (*v*). Nor where a legacy is given by a codicil to one of two executors (*w*). Nor where the executorship is limited to a particular period, or determinable on a contingency, and the legacy to the executor, at the end of such period, or on such contingency's taking place, is bequeathed over, shall it defeat his claim to the surplus (*x*). Nor shall a gift of

(*o*) *Randall v. Bookey*, 2 Vern. 425. *Southcot v. Watson*, 3 Atk. 226. *Martin v. Rebow*, 1 Bro. Ch. Rep. 154.

(*p*) 2 Fonbl. 131. note (k). *Bayley v. Powell*, 2 Vern. 361. *Wheeler v. Sheer*, *Moseley*, 288. *Andrew v. Clark*, 2 Ves. 162. *Kennedy v. Stainsby*, 1 Ves. jun. 66, in note. *Vid. tam. Attorney-General v. Hooker*, 2 P. Wms. 337.

(*q*) *Middleton v. Spicer*, 1 Bro. Ch. Rep. 201.

(*r*) *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 115. 550, note 1. 2 Fonbl. 130, note 1. *Lake v. Lake*, Amb. 126. 2 Eq. Ca. Abr. 441. *Martin v. Rebow*, 1 Bro. Ch. Rep. 154.

(*s*) 2 Fonbl. 130, note 1. 7 Bro. P. C. 511. See *Attorney-General v. Hooker*, 2 P. Wms. 338.

(*t*) *Dawson v. Clark*, 15 Ves. jun. 409.

(*u*) *Southouse v. Bate*, 2 Ves. and Bea. 396.

(*v*) 1 P. Wms. 550, note 1. *Griffith v. Rogers*, Prec. Chan. 231. 2 Eq. Ca. Ab. 444, pl. 58. *Newstead v. Johnston*, 2 Atk. 45. *Southcot v. Watson*, 3 Atk. 229. *Vid. also* 7 Bro. P. C. 511.

(*w*) *Pratt v. Sladden*, 14 Ves. jun. 193.

(*x*) 2 Fonbl. 131. note (k). *Hoskin v. Hoskins*, Prec. in Chan. 263.

only a limited interest for the life of the executor have that effect (*y*). For in these cases the legacy is considered as an exception out of the general gift to the devisee over, and therefore not such a legacy as shall exclude the executor from the residue, since it does not involve the absurdity of giving expressly a part where the whole was intended to be given (*z*). But the limited executor has an interest in the residue only while his executorship continues, on the determination of which it devolves on the general executor (*a*).

If the executor be an infant, a legacy bequeathed to him shall not, it seems, exclude him from the residue, because his infancy renders him unfit to be a trustee, and, therefore, he shall be intended to have been named for his own benefit (*b*).

[355] That parol evidence may be received for the purpose of rebutting a resulting trust, is sufficiently established by a series of cases; but it is admitted with great caution (*c*), and although not restricted to what passed at the time of making the will (*d*), yet must point to the testator's intention at that time only: evidence of his subsequent intention will have no effect (*e*). Nor shall parol evidence for such purpose be admitted, where the executor is declared by the will to be a trustee; or where the bequest to an executor is expressed in terms equivalent to such a declaration, as where the legacy is given to him for his care and trouble in fulfilling the will (*f*).

An executor taking a contingent interest under the will, was held not precluded from giving evidence of the testator's intention, that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely (*g*). (1)

(*y*) 2 Fonbl. 131. note (k). *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 114. *Jones v. Westcomb*, Prec. Chan. 316. *Nourse v. Finch*, 1 Ves. jun. 356.

(*z*) 1 P. Wms. 116. note 1.

(*a*) Vid Prec. in Chan. 264.

(*b*) *Lamplugh v. Lamplugh*, 1 P. Wms. 112. See also *Blinkhorn v. Feast*, 2 Ves. 30.

(*c*) 2 Fonbl. 135, note 1. *Rochfield v. Careless*, 2 P. Wms. 158. 160. *Duke of Rutland v. Duchess of Rutland*, 210. *Nichols v. Osborn*, 420. *Blinkhorn v.*

Feast, 2 Ves. 28. *Nourse v. Finch*, 1 Ves. jun. 358.

(*d*) Sed vid. *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 209. *Nourse v. Finch*, 1 Ves. jun. 359.

(*e*) *Lake v. Lake*, 1 Wils. 313. *Ambl. 126*. *S. C. Clennel v. Lewthwaite*. Decreed per M. R. 2 Ves. jun. 465. Decree affirmed by Lord Chancellor, *ibid.* 644. *Walton v. Walton*, 14 Ves. jun. 318.

(*f*) *Rochfield v. Careless*, 2 P. Wms. 158.

(*g*) *Lynn v. Beaver*, 1 Turn. 63.

(1) By the 11th section of the Act of 7th April, 1807, (Purd. Dig. 802. 4 Sm Laws, 402,) it is provided, that "where any person or persons shall hereafter die, having made and executed any testament and last will, and shall not therein have disposed of the residue of his or her personal estate, the executor or executors therein named shall distribute such undisposed of residue to and among the next of kin, agreeably to the intestate laws of this commonwealth; but nothing in this section contained shall be construed to affirm or deny the right of any executor or executors to such undisposed of residue prior to the passing of this act." There had been previous to the passage of this act much diversity of opinion upon

the question, whether in *Pennsylvania* the executor was a trustee for the next of kin of undisposed of personal property, or took it beneficially. The uncontradicted *dictum* of Chief Justice *McKean* in *Boudinot v. Bradford* (2 Dall. 268.), the decision of President *Wilson* in *Davis v. Davis's Ex.* (C. Pleas of *Delaware* county, April 1806, cited 3 Binn. 566.), and the dissent of Judge *Yeates* in *Wilson v. Wilson* (3 Binn. 562.), show the then prevailing impression that the law was the same as the *English* law. The case of *Grasser v. Eckart* (1 Binn. 575.) was decided upon the intention of the testator, as exhibited in that particular will, "taking for granted," to use the words of Chief Justice *Tilghman*, (1 Binn. 584.) "that our law was the same [as the *English* law] when that will was made;" but in the case of *Wilson v. Wilson* (3 Binn. 566) the Supreme Court (two judges against one) decided, that an executor was and had always been trustee for the next of kin in all cases in *Pennsylvania*; and that opinion was repeated in a subsequent case between the same parties (*Wilson v. Wilson*, 9 Serg. & Rawle, 428). Where however a testator devised all his estate, both real and personal, to his executors and their heirs, gave directions as to the manner of paying his debts, and then gave the residue, if any, to the discretion of his executors, to distribute in such manner as they may think proper, it seems that the executors take beneficially. *Case of Neave's Estate*, 9 Serg. & Rawle, 186. In *Massachusetts*, since the statute of 1783, cap. 32. sect. 1 & 7, the executor is in all cases trustee for the next of kin of the undisposed of residue. *Hays, Ex. v. Jackson*, 6 Mass. Rep. 153. So also in *North Carolina*, since the Act of 1716. *Hill v. Hill*, 2 Hayw. Rep. 298. See 1 Penn. Rep. 44.

CHAP. V.

OF THE INCOMPETENCY OF AN INFANT EXECUTOR—OF THE ACTS
OF AN EXECUTOR DURANTE MINORITATE—OF A MARRIED WOMAN
EXECUTRIX—OF CO-EXECUTORS—OF EXECUTOR OF EXECUTOR—
OF EXECUTOR DE SON TORT.

AN infant, as it has been already stated (*a*), is now by the stat. 38 *Geo. 3. c. 87.* incapable of the functions of an executor, till he shall have attained his full age of twenty-one years. Nor before the passing of this statute was an infant competent to act, till he had arrived at the age of seventeen (*b*) ; but at that age he had a right to assume the executorship. He had authority to sell the testator's effects, to pay and receive debts, to assent to and pay legacies, and, generally, to discharge the duties which belong to the representatives of the deceased (*c*). Yet, if an infant executor, after the age of seventeen, and before the age of twenty-one years, released a debt due to the testator without actually receiving it, such a release was held to be void : or if he received only a part of it, it was void [357] for the remainder ; for otherwise he would have been divested of that privilege which the law allows to all infants, of rescinding their acts when they are manifestly to their disadvantage. Nor could a proceeding, prejudicial both to the infant and to the estate, be regarded as pursuant to his office (*d*). On the same principle the assent of such infant executor to a legacy did not bind him, unless he had assets for the payment of debts (*e*). Nor had he a power of committing any other act which might involve him in the consequences of a *devastavit* (*f*). Nor, in a late case, would the Court of Chancery direct money to be paid to an infant executor, although he had attained the age of seventeen ; but referred it to a master to inquire, whether there were any debts or legacies, and to consider of a maintenance (*g*).

(*a*) Supr. 31, 101.

(*b*) Off. Ex. 214. 1 Roll. Abr. 730.
Sed vid. Clerke v. Hopkins, Cro. Eliz.
254. Manning's case, 3 Leon. 143.
Keilw. 51. Foxwist v. Tremaine, 2
Saund. 212. 1 Bl. Com. 463.

(*c*) 3 Bac. Abr. 8. Off. Ex. 215, 217,
218. Com. Dig. Admon. E.

(*d*) 3 Bac. Abr. 8. 5 Co. 27. Off.

Ex. 217, 218. Com. Dig. Admon. E.
Russell's case, Moore, 146. Knot v.
Barlow, Cro. Eliz. 671. Kniveton v.
Latham, Cro. Car. 490.

(*e*) Off. Ex. 217, 225.

(*f*) Whitmore v. Weld, 1 Vern.
328.

(*g*) Campart v. Campart, 3 Bro Ch.
Rep. 195.

But these distinctions it is now needless to discuss, the statute having altogether disqualified an infant executor from exercising the office during his minority, and having directed administration with the will annexed to be granted to some other person in the interim (*h*).

If A. appoint B., an infant, his executor, and C. executor during the minority of B., C. though only a temporary executor seems, during the continuance of his office, to be invested with the same [358] powers as belong to an absolute executor; and although he be named in the will administrator only for the benefit of the infant (*i*).

In case a married woman be executrix, the husband, as we have before seen (*k*), has a right to act in the administration with or without her consent. He is empowered to reduce into possession, or to dispose of the property by way of gift, sale, surrender, or release; to receive and pay debts; to assent to and pay legacies; and to elect for his wife to take as legatee (*l*). And his assets are chargeable in equity for waste committed during the coverture (*m*). On the contrary, such acts, if performed by her without his permission, are of no validity (*n*). If the husband be abroad, the Court of Chancery will restrain the executrix from getting in the assets of the testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the estate (*o*).

And this doctrine is founded on the principle, that as he is personally responsible for such acts, the law makes it essential to their validity, that they should be performed by him, or at least with his concurrence: otherwise the misconduct of the wife in the executorship might be extremely prejudicial to the husband (*p*).

Yet, if an executrix marry, and the husband cloine the goods, or is guilty of any other species of *devastavit*, it will be a *devastavit* [359] also by the wife, and they will be both answerable accordingly (*q*). On the other hand, if an executrix commit a *devastavit*, and then marry, the husband, as well as the wife, is chargeable for it during the coverture (*r*). (1) And where an executrix marries, and her husband and she admit assets in answer to a bill filed against them; the assets become a debt of the husband in re-

(*h*) Vid. supr. 31. 101.

(*i*) Off. Ex. 215, 216. Com. Dig. Admon. F.

(*k*) Supr. 241.

(*l*) Com. Dig. Admon. D. Off. Ex. 207, 208. Wankford v. Wankford, 1 Salk. 306.

(*m*) Adair v. Shaw, 1 Sch. and Lef. 243.

(*n*) 3 Bac. Abr. 9. Keilw. 122. Off. Ex. 207, 208. Vid. Anders. 117. 1

Roll. Abr. 924.

(*o*) Taylor v. Allen, 2 Atk. 213.

(*p*) Off. Ex. 207, 208. 225. 1 Fonbl. 84, 86. 5 Co. 27.

(*q*) Com. Dig. Admon. D. Cro. Car. 510. Dyer, 210. in marg. Beynon v. Gollins, 2 Bro. Ch. Rep. 323. Adair v. Shaw, 1 Sch. & Lef. 257.

(*r*) Com. Dig. Baron & Feme, N. King v. Hilton, Cro. Car. 603. Heyward's case, Moore, 761.

spect of such admission, and may be proved under a commission of bankruptcy issued against him (*s*).

If the testator were indebted to the husband, or, which is the same thing, to the wife before marriage, the husband may retain.

If the husband were indebted to the testator, the making of the wife executrix is equally a release of the debt, as if she had been the debtor; although if an executrix after the death of the testator marry such debtor, it will be a *devastavit* (*t*).

If specific legacies are left to a husband and wife jointly, and they are named executors, such legacies shall exclude them from the residue, for they are analogous to a specific legacy to a sole executor (*u*).

Co-executors, we may remember, are regarded in law as an individual person (*w*); and, by consequence, the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all: for they have a joint and entire authority over the [360] whole property (*x*). Hence a release of a debt by one of several executors is valid, and shall bind the rest (*y*). (1) So a grant, or a surrender of a term by one executor shall be equally available (*z*). It has been likewise held, that if one confess a judgment, the judgment shall be against all (*a*). But, on the contrary, where there were three executors, one of whom gave a warrant of attorney to confess judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant *de bonis propriis* for the costs; it was set aside, on the ground that executors may plead different pleas, (2) and that which is most for the testator's advantage shall be received (*b*). If one executor grant, or release his interest in the testator's estate to the other, nothing shall pass, because each was possessed of the whole before (*c*). It has been adjudged also that if one of two executors appointed by the obligee deliver the bond to a stranger in satisfaction of a debt due from himself, and die; although the debt as a chose in action could not pass by the assignment, yet by this delivery the party had such an interest in the instrument, that he might justify the detention of it as against the surviving executor (*d*); but

(*s*) Matter of M^cWilliams, 1 Scho. & Lef. 173.

(*t*) Off. Ex. 207.

(*u*) 1 P. Wms. 550, note 1, ad fin. Willis v. Brady, Barnard. 64.

(*w*) Vid. supr. 37. 243.

(*x*) 3 Bac. Abr. 30. Off. Ex. 95. 1 Roll. Abr. 924. Com. Dig. Admon. B 12.

(*y*) Dyer, 23 b. Jacomb v. Har-

wood, 2 Ves. 267.

(*z*) Ibid. 23 b.

(*a*) Ibid. 23 b. in note.

(*b*) Elwell v. Quash, Stra. 20. Vid. Baldwin v. Church, 10 Mod. 323. Hudson v. Hudson, 1 Atk. 460.

(*c*) Godolph. 134. 3 Bac. Abr. 31.

(*d*) 2 Roll. Abr. 46. Dyer, 23 b. Kelso v. Nicholson, Cro. Eliz. 478.

S. C. 496.

(1) 3 Johns. Rep. 70. 11 Johns. Rep. 21. Murray v. Blutchford, 1 Wend. Rep. 583.

(2) Heisler v. Knipe, 1 P. A. Browne's Rep. 319.

the law of this case seems very dubious, inasmuch as the debt, not being assignable, could not pass by the delivery of the obligation (*e*).

[361] One executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion (*f*).

An assent to a legacy by one of several executors is sufficient (*g*). And if there be a devise to all the executors generally, one of them may assent for his part (*h*).

Co-executors, as well as a sole executor, shall be excluded from the residue, either in case the testator shall have expressly described them as mere trustees, or, according to the fair construction of the will, appears to have so considered them; or in case he has made an imperfect disposition of the residue, as where he has inserted a residuary clause without proceeding to specify the residuary legatee, or where he hath bequeathed the surplus to a party, who died before him (*i*).

If a legacy be given to one executor, expressly for his care and trouble, and no legacy be given to his co-executor, they shall both be barred of the residue (*k*). For one being a trustee, the other must be a trustee also. Yet if there be two or more executors, a legacy to one, expressed to be a testimony of regard and immediately following a particular trust imposed upon him by the will, shall not exclude them from the residue (*l*), nor shall even a simple legacy to one of them have that effect; for the testator may have intended a preference to him to that extent (*m*). So, where several executors have unequal legacies, whether pecuniary, or specific, they shall nevertheless be entitled to the surplus (*n*). (1) But where equal pecuniary legacies are given to co-executors, a trust shall result for the next of kin (*o*). The arguments which have been urged in opposition to this rule, and to shew that the giving of equal pecuniary legacies to several executors, is not absolutely inconsistent with an intention that they should take the surplus, are that such gift would secure to them a proportion of their legacies in the event

(*e*) 3 Bac. Abr. in note.

(*f*) 2 Fonbl. 407, note (1). 11 Vin. Abr. 72. 3 Bl. Com. 19.

(*g*) Com. Dig. Admon. C. 8. Off. Ex. 225.

(*h*) 1 Roll. Abr. 618.

(*i*) 1 P. Wms. Petit v. Smith, 7. & 550, note 1. 2 Fonbl. 133, in note.

(*k*) 2 Fonbl. 133, in note. White v. Evans, 4 Ves. jun. 21.

(*l*) Griffiths v. Hamilton, 12 Ves. jun. 298.

(*m*) 1 P. Wms. 550, note 1. Coles-

worth v. Brangwin, Prec. Chan. 323.

4 Bro. P. C. 1. Bishop of Cloyne v. Young, 2 Ves. 91. Wilson v. Ivat, ib. 166, 167. 2 Fonbl. 133, in note. Buffar v. Bradford, 2 Atk. 220.

(*n*) 1 P. Wms. 550, note 1. Brashbridge v. Woodroffe, 2 Atk. 69. Bowker v. Hunter, 1 Bro. Ch. Rep. 328. 2 Fonbl. 134, in note. Blinkhorn v. Feast, 2 Ves. 27.

(*o*) Petit v. Smith, 1 P. Wms. 7. Carey v. Goodinge, 3 Bro. Ch. Rep. 110.

of a deficiency of assets, which applies equally to the case of a *sole* executor ; and that they would take the legacies severally, whereas the residue would belong to them jointly: yet the rule has long prevailed as above stated (*p*). No case, however, occurs in the books, in which distinct specific legacies of equal value to several executors have excluded them from the residue. And the argument, which supports the rule as to pecuniary, by no means applies with equal force to specific legacies, since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, among his executors in some particular manner, although equal in point of value, and consistently with an intention that they should take the surplus (*q*).

Nor does the case just mentioned (*r*), of specific legacies be-
[363] queathed jointly to a husband and wife, who are named executors, bear upon the point ; for, as it was before observed, it is similar to that of a specific legacy to a sole executor (*s*).

Co-executors taking a residue in that character take as joint tenants ; therefore, if one of them die before severance, his share shall survive (*t*).

The power of an executor is not determined by the death of his co-executor, but survives to him ; and, therefore, it is held he may assent to a legacy (*u*). Whether a power of selling land, of which I shall presently speak, given to co-executors, is in strictness of law capable of being exercised by the survivor, is a point on which there are opposite authorities (*w*). (1). Nor is it now material to resolve

(*p*) 1 P. Wms. 550, note 1.

(*q*) Ibid. 2 Fonbl. 134, in note.

(*r*) Supr. 359.

(*s*) 1 P. Wms. 550, note 1. ad fin.
Willis v. Brady, Barnard. 64.

(*t*) Frewin v. Rolfe, 2 Bro. Ch. Rep.
220. Griffiths v. Hamilton, 12 Ves.
jun. 298.

(*u*) Com. Dig. Admon. B. 12. Flan-
ders v. Clarke, 3 Atk. 509. S. C. 1
Ves. 9.

(*w*) Harg. Co. Litt. 113, and note 2.
1 Dy. 177. Moore, 61. Perk. S. 550.
Bro. Abr. Devise, 50. Howell v. Barnes,
Cro. Car. 382. Barnes's case, W. Jones,
352.

(1) Where the authority to sell is given to executors *virtute officii*, a surviving executor may sell ; and an acting executor has the same power, upon the renunciation of the other executors, or their declining to act. *Lessee of Le Bach v. Smith*, 3 Binn. 69. *Jackson v. Ferris*, 15 Johns. Rep. 348. *Nelson v. Carrington*, 4 Munf. 332. *Digges' Lessee v. Jarman*, 4 Harr. & McHen. 485. In *Pennsylvania*, by the provisions of the Act of 12th March, 1800, (Purd. Dig. 277, 4 Dall. Laws, 593, 3 Sm. Laws, 433,) express power is given to a surviving executor or surviving executors, an acting executor or acting executors, where others renounce or are dismissed from the trust, to administrators with the will annexed, and administrators *de bonis non*, to execute all powers and authorities to sell lands contained in any last will and testament, as fully and amply as if all the executors named had joined therein.

Where lands are devised to be sold, but the testator does not direct his executors to sell them, they have the power by necessary implication, (*Darouc v. Fanning*, 2 Johns. Cha. Rep. 252.) and such power may be executed by a surviving executor. *Lloyd's Lessee v. Taylor*, 2 Dall. Rep. 223. See, however, *Drayton v. Drayton*, 2 Desaus. Rep. 250. n. *Shoolbred v. Drayton*, 2 Desaus. Rep. 246.

it, as such power, although extinct at law, would certainly be enforced in equity, which considers the application directed by the testator of the money arising from the sale to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees, in conformity to the rule that a trust shall never fail of execution for want of a trustee; and that if there be one wanting, the court will execute the office. The relief is administered by regarding the land, in whatever person vested, as bound by [364] the trust, and compelling the heir, or other person having the legal estate, to perform it (*x*).

As a mediate or remote executor has the same interest in the effects of the original testator as the immediate executor, he is invested with the same authority and privileges, and is bound to administer such effects in the same manner (*y*). But in cases of special trust confided to the executor without the ordinary limits of his duty; as to sell land, and the like; if it be not performed by the original executor, some books allege that no successive executor, as such, shall have authority for that purpose (*z*). On the other hand, it has been held that such a power of selling given to an executor is transmissible in the way of succession in *infinitum*, till executed (*a*). But this point is of no more importance than that just mentioned, and for the same reason.

If an executor who has not proved, assist his co-executor who has, in writing letters to collect debts, or by writing directly to a debtor of the testator requiring payment, it will not be considered by the court as acting, so as to charge him (*b*).

In respect to an executor *de son tort*, he may perform a variety of acts, which shall be as binding as those of a rightful executor (*c*). As against creditors, he is justified in paying the debts of the deceased (*d*), and, indeed, may be compelled to pay them so far as [365] assets come to his hands (*e*); and to an action brought against him by a creditor, he may plead *plenè administravit* (*f*).

In case the rightful representative shall think fit to pursue his legal remedy against such an intruder, he has no defence; as, if it be by action of trover for the goods of the testator, the executor *de son tort* cannot plead payment of debts to the value, or that he hath given the goods in satisfaction of the debts; for he had no right to interfere.

Yet, on the general issue pleaded, he may give in evidence such payments, and they shall be deducted from the damages (*g*); or, if

(*x*) Harg. Co. Litt. 113, note 2.

(*d*) Off. Ex. 181, 182.

(*y*) Com. Dig. Admon. G. Off. Ex. 257, 258. Shep. Touchs. 464.

(*e*) 2 Bl. Com. 507. Dyer, 166 b.

(*z*) Off. Ex. 258, 259.

(*f*) 3 Bac. Abr. 25. 5 Co. 30. Off. Ex. 181. Whitehall v. Squire, Carth. 104. Sid. 76.

(*a*) Harg. Co. Litt. 113. note 2. Keilw. 44. 2 Brownl. 194. Dyer, 210. 371 b.

(*g*) Com. Dig. Admon. C. 3. 3 Bac. Abr. 25. Carth. 104. Skin. 274. pl. 2.

(*b*) Orr v. Newton, 2 Cox's Rep. 274.

Off. Ex. 182. Anon. 1 Ventr. 349, 350. 2 Bl. Com. 508.

(*c*) 3 Bac. Abr. 25. Off. Ex. 180.

they amount to the full value, the plaintiff shall be nonsuited (*h*). But it may be doubted, whether in such action the defendant can give in evidence payment of debts to the value of such goods as are still in his custody, or only of those which he has sold (*i*). If the action be trespass instead of trover, payment of debts to the value will go only in mitigation of damages (*k*), and the plaintiff will be entitled to a verdict.

The ground of the distinction seems to be this: in trover, his possession is admitted to have been lawful, and the subsequent distribution negatives the conversion; but in trespass, the unlawful [366] taking is the subject matter of complaint, to which the distribution is not an answer.

Nor in any case shall such payments be allowed to nonsuit the plaintiff, or to lessen the damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference (*l*).

Nor shall an executor *de son tort* derive any advantage from the wrongful character which he has assumed. He is not entitled to bring an action in right of the deceased (*m*); (1) nor is he empowered to retain in satisfaction of his own debt: for such a privilege would enable him to profit by his own tortious acts, and would tend to encourage a competition of creditors, who should first take possession of the testator's effects without any legal authority (*n*).

There is, indeed, one exception to this rule; a party who by stat. 43 *Eliz. c. 8.* (*o*) becomes an executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator, who has obtained the grant fraudulently, is by the express provision of that act allowed to retain. But in all other instances, an executor *de son tort* is excluded from this advantage. Nor shall he retain for his own debt, even against a creditor of inferior degree (*p*). Nor, after an action brought against him by a creditor, can he avail himself of a delivery over of the effects to the rightful administrator, though before the filing of the plea; nor of the assent of the administrator to his retainer of his debt. Nor is the case varied, although in point of fact no administration were granted at the time of the commencement of such suit, and the defendant without delay relinquished the property to the grantee (*q*).

(*h*) L. of Ni. Pri. 48.

(*i*) Ibid. Parker v. Kett, 12 Mod. 471.

(*k*) L. of Ni. Pri. 48. 91. Ca. B. R. 441.

(*l*) 2 Bl. Com. 508. Off. Ex. 182.

(*m*) 2 Bl. Com. 507. Bro. Abr. tit. Admon. 8. 11 Vin. Abr. 222. 2 Anders. 39. pl. 25.

(*n*) 2 Bl. Com. 511. 5 Co. 30. Moore, 527.

(*o*) See Com. Dig. Admon. C. 3. Off. Ex. 182, 183. 2 H. Bl. 26. in note, and vid. supr. 39.

(*p*) 3 Bac. Abr. 25. 5 Co. 30. Ireland v. Coulter, Cro. Eliz. 630. 1 Roll. Abr. 922.

(*q*) Curtis v. Vernon, 3 Term. Rep. 587. affirmed in Exch. Chan. 2 H. Bl. 26.

If the executor *de son tort* deliver the effects to the administrator before such action brought, that is a sufficient defence, and he may give it in evidence on the plea of *plenè administravit* (r).

The grant of administration to such executor shall legalize his previous acts (s). (1) Thus, where he takes possession of the testator's goods, and sells them, and afterwards is appointed administrator, such subsequent grant shall make the sale effectual (t). So if A. be ordered by B. to sell the effects of the intestate, and B. afterwards take out administration; A. to an action brought against him by a creditor may plead *plenè administravit*, and shall be discharged [368] ed on this evidence (u). An administration, also, committed to an executor *de son tort*, and although committed to him *pendente lite*, shall warrant his retainer of his own debt, on the same principle of necessity on which such right of executors is in general founded, namely, to avoid the inconvenience and absurdity of a party's instituting a suit against himself (x). So, where A. entitled to administration was opposed in the ecclesiastical court, and, *pendente lite*, being sued as executor in the Court of King's Bench, pleaded a retainer for a debt due to himself, to which the plaintiff replied, that the defendant was executor *de son tort*; the defendant rejoined, that letters of administration had been granted to him *puis darrein continuance*; on demurrer the plea was allowed, and judgment given for the defendant (y). But if A. dispose of an intestate's goods to B. for the payment of the funeral, and afterwards take administration, it has been held, he shall not have an action of trover against B. for the goods (z).

(r) Anon. 1 Salk. 313.

Ventr. 180. Sty. 337.

(s) Com. Dig. Admor. C. 3. Kenrick v. Burgess, Moore, 126. Curtis v. Vernon, 3 Term. Rep. 590. 2 H. Bl. 25.

(y) 3 Bac. Abr. 26. in note. Vaughan v. Browne, 2 Stra. 1106. Andr. 328. S. C. 3 Term. Rep. 588. S. C. cited L. of Ni. Pri. 143, 144.

(t) Moore, 126.

(z) P. per two just. Holt, C. J. contr. Whitehall v. Squire, Salk. 295. S. C. Skin. 274. Vid. S. C. Carth. 104. and supr. 244.

(u) Whytmore v. Porter, Cro. Car. 88.

(x) 2 H. 11. 25. argdo. Com. Dig. Admor. C. 3. Pyne v. Woolland, 2

(1) See *ante* 243, note (2).

CHAP. VI.

OF DISTRIBUTION.

SECT. I.

Of distribution under the statute—and herein of advancement.

I AM now to discuss the power and duty of an administrator. His office, so far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor. But as there is no will to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses.

After the ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner above mentioned (*a*), to delegate such authority to the relations of the deceased, the spiritual court attempted to enforce a distribution, and took bonds of the administrator for that purpose; but such bonds were prohibited in the temporal courts, and declared to be void in point of law, on the ground, that by the grant of administration the ecclesiastical authority was executed, and ought to interpose no farther (*b*). Thus the grantee was entitled not only to administer, but also, exclusively to enjoy the residue of the intestate's effects (*c*). For the purpose, therefore, of aiding the imperfect jurisdiction of the ordinary, and of preventing any single hand from sweeping away the whole surplus (*d*), the stat. 22 & 23 *Car. 2. c. 10.* commonly called the statute of distributions (*e*) was enacted. (1)

(*a*) Supr. 80. et seq.

(*b*) 2 Bl. Com. 515. Edwards v. Freeman, 2 P. Wms. 441. Hughes v. Hughes, 1 Lev. 233. S. C. Cart. 125.

(*c*) Edwards v. Freeman, 2 P. Wms. 448.

(*d*) Petit v. Smith, 1 P. Wms. 8.

Bowers v. Littlewood, 594. Carter v.

Crawley, Raym. 496. 4 Burn. Eccl. L. 342, 343.

(*e*) Made perpetual by 1 Jac. 2. c. 17. s. 5. Vid. Rex v. Raines, 1 Ld. Raym. 574.

(1) In *Pennsylvania* provision is made for the descent of the real and distribution of the personal estate of persons dying intestate, by the following sections of the act of 19th April, 1794, (Purd. Dig. 373. 3 Dall. Laws, 521. 3 Sm. Laws, 135.) viz :

SECT. III. The remaining part of any lands, tenements and hereditaments, and personal estate of any person deceased, not sold or disposed of by will, nor otherwise limited by marriage settlement, shall be divided and be enjoyed in manner following, *to wit* : If the intestate leaves a widow and lawful issue, the widow shall be entitled to one third part of the real estate, for and during her natural life, and to one third of the personal estate absolutely ; and the remaining two thirds of the said estate real and personal, shall immediately descend and be distributed to the lawful children of the intestate, such children always to inherit and enjoy, as tenants in common, in equal parts : And in case the person dying intestate shall leave several persons lawful issue in the direct line of lineal descent, and all of equal degree of consanguinity to the person so dying intestate, the said two thirds of such estate shall descend and be distributed to the said several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be, in the same manner as if they were all daughters of the person so dying intestate : And in case the intestate shall leave lawful issue of different degrees of consanguinity to him or her, the said two thirds of such estate shall descend, and the personal estate be distributed, to the lawful child or children of the intestate, if either or any of them be then living, and to the lawful issue of such of the children as shall be then dead, leaving lawful issue, as tenants in common ; such issue always to inherit, if one person, solely, and if several persons, as tenants in common, in equal parts, such share only as would have descended to his or their parent, if such parent had been then living ; and each of the lawful children of the intestate always to inherit and receive such share as would have descended or been distributed to him or her, if all the children of the intestate, who shall be then dead, leaving lawful issue, had been living at the death of the intestate : And if there be no child of the intestate living at the death of the intestate, and only a grandchild or grandchildren, and the lawful issue of a grandchild or grandchildren, who shall be then dead, leaving lawful issue, then the real estate shall descend, and the personal estate be distributed to such grandchild or grandchildren of the intestate, and to the lawful issue of such of the grandchildren of the intestate, as shall then be dead, leaving issue, as tenants in common ; such issue always to inherit, if one person, solely, and if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her, or their parent, if such parent had been then living : and each of the grandchildren of the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and receive such share as would have descended or been distributed to him or her, if all the grandchildren of the intestate, who shall be then dead, leaving lawful issue, had been living at the time of the death of the intestate ; And the same law of inheritance, descent and distribution, shall be observed, in case of the death of the grandchildren, and other descendants, to the remotest degree.

SECT. IV. In case the intestate leaves no widow, the whole real and personal estate shall descend and be divided as is directed in the preceding section with respect to the estate not disposed of in favour of the widow : and if the intestate shall leave a widow and no lawful issue, the said widow shall have one moiety or half part of the real estate, including the mansion house, during her natural life, except in cases where in the judgment of the orphan's court, the estate cannot with propriety be divided ; and in that case she shall have and receive the rents and profits of one moiety of the real estate during her natural life, and one moiety of the personal estate absolutely ; the remaining moiety to descend and be disposed of, as is provided with respect to the whole estate, in case the intestate leaves no widow ; and the real estate so as aforesaid to be enjoyed by the widow during her natural life, shall descend and be disposed of as is by this act provided with respect to the whole estate, in case the intestate leaves no widow.

SECT. V. In case any person so as aforesaid seized or possessed shall die, leaving neither widow nor lawful issue, but leaving a father, the whole of the said real estate shall be enjoyed by the father of the intestate, for and during the natural life of such father, and the personal estate of the said intestate shall pass and be vested in the said father absolutely ; unless the said real and personal estate, or either of them, came to the person so dying seized or possessed, from the

part of his or her mother, in which case the said estate, or such part thereof as shall have come from the part of his or her mother, shall descend, pass and be enjoyed or possessed, as if such person so dying seized or possessed had survived his or her father.

SECT. VI. If any person so dying seized shall leave neither widow nor lawful issue, but shall leave a father, and brothers and sisters, the said real estate shall descend to and be enjoyed by the brothers and sisters of the intestate, after the decease of the father, as tenants in common, in equal parts; and if any of the brothers or sisters of the intestate shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by the surviving brothers and sisters, and the lawful issue of such brothers or sisters as shall then be dead, leaving lawful issue, such issue always to inherit, if one person, solely, if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, had such parent been then living; and each of the brothers and sisters of the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and enjoy such share as would have descended and been distributed to him or her, if all the brothers and sisters leaving lawful issue had been living at the time of the death of the intestate; but if the intestate shall leave no brothers or sisters, nor their representatives, then the estate shall go to the father in fee simple, unless where the estate has descended from the part of the mother as aforesaid.

SECT. VII. In case any person so as aforesaid seized or possessed shall die, leaving no widow nor lawful issue, nor father, but leaving a mother, the whole of the real estate shall be enjoyed by the mother of the intestate, for and during the natural life of such mother; and the personal estate of the said intestate shall pass and be vested in the said mother absolutely, unless the said real and personal estates, or either of them, came to the person so dying seized or possessed from the part of his or her father, in which case the said estate, or such part thereof as shall have come from the part of his or her father, shall descend, pass and be enjoyed or possessed, as if such person so dying seized or possessed had survived his or her mother.

SECT. VIII. If the person so dying seized shall leave neither widow nor lawful issue, but shall leave a mother, and brothers and sisters, the said real estate shall descend to and be enjoyed by the brothers and sisters of the intestate, or their representatives, after the decease of the mother, as tenants in common, in equal parts; and if any of the brothers or sisters of the intestate shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by the surviving brothers and sisters, and the lawful issue of such brothers or sisters as shall be then dead, leaving lawful issue, such issue always to inherit, if one person, solely, if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, had such parent been then living; and each of the brothers and sisters of the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and enjoy such share as would have descended and been distributed to him or her, if all the brothers and sisters leaving lawful issue had been living at the time of the death of the intestate.

SECT. IX. In case any child shall have any estate by settlement of the intestate, or shall be advanced by the intestate, in his or her lifetime, by portion or portions, equal to the share which shall be divided and allotted to the other children, and other descendants, whether the same be by lands or personal estate, such person shall have no share of the estate of which the said person died seized or possessed: and in case any child shall have any estate by settlement from the intestate, or shall have been advanced by the said intestate in his or her lifetime, whether the said portion or advancement be in real or personal property, but not equal to the share which will be due to the other children or descendants, then so much of the surplusage of the said estate of the intestate to be distributed to such child or children, as shall make the estate of all the said children or descendants, to be equal; excepting, nevertheless, that where the issue to take, shall not be of equal degree to the person dying seized or possessed, the several descendants taking by representation to inherit and enjoy, the one person solely,

That statute, after empowering the ordinary, on the granting of administration, to take a bond of the administrator, with two or more sureties, conditioned as I have already stated, further authorizes him to proceed, and call such administrator to account touching the goods of the intestate; and on hearing, and on due consideration thereof, to make equal and just distribution of what remains clear after all debts, funeral, and just expences of every sort first allowed and deducted, among the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the deceased, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation thereafter set down; and the same distributions to decree and settle, and to compel such administrator to observe and pay the same by the due course of the ecclesiastical laws. The statute then proceeds to prescribe the distribution of such surplusage [371] in manner following; that is to say, one third part thereof to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children, not being heir at law, as shall have any estate by the settlement from the intestate, or shall be advanced by him in his lifetime by portion, equal to the share which shall by such distribution be allotted to the other children, to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the intes-

and several persons, as tenants in common, in equal parts, such share only as would have descended or been distributed to his, her or their parent or ancestor, if such parent or ancestor had been then living.

SECT. X. All posthumous children shall in all cases whatsoever, inherit in like manner, as if they were born in the lifetime of their respective fathers.

SECT. XI. Where any person shall die seized as aforesaid, leaving no children, or lawful issue, father or mother, brothers or sisters or their lawful issue, of the whole blood, then brothers and sisters of the half blood, and their lawful issue, shall inherit the same as aforesaid, in preference to the more remote kindred of the whole blood, unless where such inheritance came to the said person so seized by descent, devise or gift, of some one of his or her ancestors, in which case all those, who are not of the blood of such ancestor, shall be excluded from such inheritance.

SECT. XII. The real and personal estate of any person dying intestate, in case such person leaves neither widow nor lineal descendant, nor father or mother, or brothers or sisters, of the whole or half blood, or lawful issue of any brother or sister of the whole or half blood, shall descend to and be divided among the next of kin of equal degree; and if any such kindred shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by such surviving kindred, and the lawful issue of such kindred as may be then dead, leaving issue, as tenants in common, such issue always to inherit, if one person, solely, and if several persons as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, if such parent had been then living; and each of the kindred in equal degree to the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and receive such share as would have descended to him or her, if all such kindred leaving lawful issue had been living at the time of the death of the intestate.

tate, or shall be advanced by him in his lifetime by portion, not equal to the share which will be due to the other children by the distribution, then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the lifetime of the intestate, as shall make the estate of all the children to be equal, as near as can be estimated : but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land.

It then directs, that in case there be no children, nor any legal representatives of them, one moiety of the estate shall be allotted to the wife of the intestate, and the residue of the same shall be distributed equally among every of his next of kindred who are in equal degree, and those who legally represent them.

[372] It also provides, that no representations shall be admitted among collaterals after brothers' and sisters' children ; and in case there be no wife, then that all the estate shall be distributed equally among the children ; and in case there be no child, then among the next in kindred to the intestate in equal degree, and their legal representatives as aforesaid, and in no other manner.

And it further directs, for the benefit of creditors, that no such distribution of the goods of the intestate shall be made, till after the expiration of one year from his death ; and that every one to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the spiritual court, that if any debt, truly owing by the intestate, shall afterwards be sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he shall refund, and pay back to the administrator, his rateable part of that debt and of the costs of suit, and charges of the administrator by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt so discovered after the distribution made.

The statute also contains a proviso, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do : and the will of the deceased in such testament expressed, shall be performed and observed in such manner as before the passing of the act.

[373] It also expressly excepts and reserves the customs of the city of London, of the province of York, and of other places having peculiar customs of distributing an intestate's effects.

Doubts having arisen whether the husband's right to administration to his wife was not superseded by force of this statute, and whether he was not thereby bound to distribute her personal estate among her next of kin (*f*) : by the stat. 29 *Car. 2. c. 3. s. 25.* it is provided, that the above act shall not extend to estates of feme

(*f*) Vid. *supr.* 85.

coverts who die intestate, but that the husband may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as before. And although he die without having taken out letters of administration to his deceased wife, her next of kin, on taking out such administration, will be a trustee for the husband's personal representative; for the operation of this clause in the statute of frauds is not confined to the life of the husband, nor to the circumstances of his having reduced any part of his wife's personal estate into possession, but provides that no part of her estate shall be distributable among her relations after her death (g).

On the construction of the statute of distributions, a variety of points have been resolved.

After the allotment of the third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions among the intestate's children, and such persons as legally represent such children, in case any of them be dead, that is, their lineal descendants to the remotest degree (h).

To attain a clear apprehension of the subject, three sorts of cases [374] may be supposed: First, where none of the intestate's children are dead. Secondly, where the intestate's children are all dead, all of them having left children. Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children.

On the first hypothesis, that is to say, where none of the intestate's children are dead; it is sufficiently obvious that after the wife has had her third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate, as in this case they all claim in their own right. A brother or sister of the half blood shall be equally entitled to a share with one of the whole blood, inasmuch as they are both equally near of kin to the intestate (i). Nor shall their being posthumous in either case make any difference (k). For a child *en ventre sa mere* at the time of the father's death, being a person *in rerum natura*, is by the rules of the common and civil law, to all intents and purposes, a child, as much as if born in the father's lifetime, and, consequently, is entitled under the statute (l). If the intestate leave only one child, such case is not to be considered as omitted by the statute; therefore, in case he also leave a wife, she

(g) Squib v. Wyn, 1 P. Wms. 381.

(h) Vid. 4 Burn. Eccl. L. 358. Com. Dig. Admon. H. Carter v. Crawley, Raym. 500. Pett's Case, 1 P. Wms. 27.

(i) 3 Bac. Abr. 74. Com. Dig. Admon. H. Smith v. Tracy, 1 Mod. 209. S. C. 2 Mod. 204. 2 Jones, 93. S. C. 1 Ventr. 316. S. C. 2 Lev. 173. Show. Parl. Ca. 108. Earl of Winchelsea v. Norcliffe, 1 Vern. 437. Crooke v.

Watt, 2 Vern. 124. Brown v. Farn-dell, Carth. 51.

(k) Burnet v. Man, 1 Ves. 156. 4 Burn. Eccl. L. 344. Ball v. Smith, 2 Freem. 230. Edwards v. Freeman, 2 P. Wms. 446.

(l) Wallis v. Hodgson, 2 Atk. 117. See also Thellusson v. Woodford, 11 Ves. jun. 139.

shall have only a third part, and the other two-thirds shall go to such child (*m*). So, where there is only one to claim under the statute, and therefore, literally and strictly speaking, there can be no distribution, yet such individual shall be entitled to the property (*n*).

[375] In regard to the second supposition, if A. have three children B. C. and D., and they all die, B. leaving, for instance, two children, C. three, and D. four, and A. afterwards die intestate; in that case all his grand-children shall have an equal share; for as his children are all dead, their children shall take as next of kin. Such also would be the case with respect to the great grand-children of the intestate, if both his children and grand-children had all died before him (*o*).

In all the above instances, the parties are said to take *per capita*, or, in other words, equal shares in their own right (*p*).

Thirdly, in the event of some of the intestate's children being living, and some dead, and such as are dead having each left children; the grand-children take *per stirpes*, that is to say, not in their own right, but by representation (*q*). Thus, for example, if A. have three sons, B. C. and D., and B. die, leaving four children, and C. die, leaving two: on A.'s dying intestate, one third shall be allotted to D., one third to B.'s four children, and the remaining third to C.'s two children; for these grand-children are entitled as representing their respective parents (*r*).

After directing the residue to be divided among the children, or [376] their representatives, as above stated, the statute provides, that no child of the intestate, except his heir at law, on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall participate with them of the surplus; but if the estate so given him by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so, shall be allotted to him.

The statute does not divest the child of any property which has thus been given to him, however unequal it may have been, or how much soever it may exceed the residue: he may, if he pleases, keep it all: if he be not contented, but would have more, then he must bring what he has before received, as the law expresses it, into hotchpot, that is, into the general mass of the property to be so divided.

(*m*) 3 Bac. Abr. 75. Brown v. Farn-
dell, Carth. 52. Skin. 212. pl. 5. 219.
pl. 3.

(*n*) 4 Burn. Eccl. L. 343. 3 P. Wms.
49, note (d). Palmer v. Garrard, Prec.
in Ch. 21.

(*o*) 3 Bac. Abr. 75. 1 Eq. Ca. Abr.
249, pl. 7. Walsh v. Walsh, Prec. Chan.
54. Bowers v. Littlewood, 1 P. Wms.

595. Davers v. Dewes, 3 P. Wms. 50.
Lloyd v. Tench, 2 Ves. 213. Durant v.
Prestwood, 1 Atk. 454. Janson v. Bu-
ry, Bunb. 159. 2 Bl. Com. 517.

(*p*) 2 Bl. Com. 218. 517.

(*q*) 2 Bl. Com. 217.

(*r*) 3 Bac. Abr. 75. 1 Eq. Ca. Abr.
249. Walsh v. Walsh, Prec. Chan. 54.
2 Bl. Com. 517.

This is the clear intention of the act, grounded on that principle of equality (*s*), to which a court of equity is ever inclined.

Therefore, before a younger child has any claim to a share of the distribution, he must first bring his advancement into hotch-pot.

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore a child advanced by her father in his life, cannot be called on to bring her share into hotchpot (*t*).

What shall constitute such advancement, is now to be discussed.

If a father purchase for a son an advowson, or any other ecclesiastical benefice, or, if he buy him any office, civil or military, these are held to be such advancements either partial or complete, according to the comparative value of the estate to be distributed (*u*). And although the office be only at will, as a gentleman pensioner's place, or a commission in the army, it is regarded in the same light (*w*).

A provision made for a child by settlement, either voluntary or for a good consideration, as that of a marriage, is an advancement *pro tanto* (*x*).

Nor does the statute extend only to land itself (*y*), when settled on a younger child by the father, but also to a charge on the land, created by him for the benefit of such child; therefore, if a father settle a rent out of his lands on a younger child, this also is such an advancement as is intended by the statute (*z*). Nor is it necessary that the provision should take place in the father's lifetime (*a*). If by deed he settle an annuity, to commence after his death on such child, it is of the same description (*b*). So a reversion settled on a child, as it is capable of being valued, is of the same nature (*c*). A portion secured to a child, although *in futuro*, is also an advancement (*d*). And were it only contingent, yet when the contingency has happened, it shall be thus considered (*e*).

A portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was accordingly held to be an advancement to her when she married, al-

(*s*) *Edwards v. Freeman*, 2 P. Wms. 443. 449. 4 Burn Eccl. L. 344. 2 Bl. Com. 190. 517.

(*t*) *Per Mas. of the Rolls*, *Walton v. Walton*, 14 Ves. jun. 324.

(*u*) 3 P. Wms. 317, note (o). See *vid. Swinb. p. 3. s. 18.*

(*w*) 3 P. Wms. 317, note (o).

(*x*) *Edwards v. Freeman*, 2 P. Wms. 440. 444. *Phiney v. Phiney*, 2 Vern. 638.

(*y*) 11 Vin. Abr. 192. 2 P. Wms. 441.

(*z*) *Edwards v. Freeman*, 2 P. Wms. 441.

(*a*) *Ibid.* 2 P. Wms. 440. 445.

(*b*) *Ibid.* 2 P. Wms. 442. *Swinb. p.*

3. s. 4.

(*c*) *Ib.* 2 P. Wms. 442.

(*d*) *Edwards v. Freeman*, 2 P. Wms. 445.

(*e*) *Ib.* 2 P. Wms. 442. 446. 449.

though she were under that age, and unmarried, at the time of the intestate's death (*f*).

A portion, also, while contingent, is capable of a valuation, and may, it seems, be brought into hotchpot (*g*); or the court may order, that, in case the contingency should happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (*h*). But the contingency must be so limited as necessarily to arise within a reasonable time, as in the above case, where the portion was secured for the daughter, on her attaining the age of eighteen, or on her marriage (*i*). A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (*k*). If a child who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can [379] have no better claim than he would have had if living (*l*).

By this statute, although the heir at law shall not abate in respect to the land which came to him by descent, or otherwise, from the intestate; yet if he hath had an advancement from his father in his lifetime out of the personal estate, he shall abate for it in the same manner as the other children (*m*). And, were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*n*). So, where A. on his marriage covenanted, in case of a second marriage, to pay his eldest son by his first wife five hundred pounds; she died, leaving a son, and other children, and A. after a second marriage died intestate; it was decreed, that his heir should bring in the money, although he were in the nature of a purchaser, under a marriage settlement (*o*).

Co-heiresses shall also, it seems, bring in such advancement, not being land, as they may have respectively received from their father, before they shall be entitled to their distributive shares, agreeably to the principle of the act, and to the object of a just and impartial father to promote an equality among his children (*p*).

[380] Such is the nature of the advancement which will exclude a child from any part of the residue. Many benefits, however, may be conferred upon him by his father, which have been held not to be of this description.

Small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to the child, as of a

(*f*) 2 P. Wms. 435. 1 Eq. Ca. Abr. 249. pl. 10. 2 Eq. Ca. Abr. 446. pl. 3.

(*g*) Per Sir Jos. Jekyl, M. R. arguendo. 2 P. Wms. 442.

(*h*) Per Lord Raymond, C. J. arguendo. 2 P. Wms. 446.

(*i*) 2 P. Wms. 440. 445. 449.

(*k*) 3 Bac. Abr. 77. Ward v. Lant, Prec. Chan. 182. 184.

(*l*) Proud v. Turner, 2 P. Wms. 569.

(*m*) Com. Dig. Admon. H. 4 Burn. Eccl. L. 344. Fitzg. 285.

(*n*) Com. Dig. Admon. H. Fitzg. 285.

(*o*) Phiney v. Phiney, 2 Vern. 638.

(*p*) 4 Burn. Eccl. L. 344. Edwards v. Freeman, 2 P. Wms. 440. 443.

gold watch or wedding clothes, shall not be deemed an advancement (*q*); (1) nor shall money expended by the father for his maintenance, nor given to bind him apprentice, nor laid out in his education at school, at the university, or on his travels (*r*). Nor shall what a child receives out of the *mother's* estate be so regarded; for the statute of distributions was grounded on the custom of London, which never affected a widow's personal estate, and seems to include those only within the clause of hotchpot, who are capable of having a wife as well as children, which must be husbands (*s*). Nor shall a provision which a father may make for his child by will, (for a case may occur where a testator may die intestate as to part of his personal estate,) be considered in that light. Nor land given by the father's will to a younger child (*t*).

Such a provision as shall be construed an advancement, must result from a complete act of the intestate in his lifetime (*u*), by which he divested himself of all property in the subject, though, as we have just seen (*w*), it may not take effect in possession till after his death. Still less shall property given or bequeathed to the [381] child by any other person be so denominated (*x*); and least of all, shall a fortune of his own acquisition (*y*).

In respect to Borough English lands, which descend to the youngest son, it has been held that he should allow for them, on the ground, that the statute intended merely to provide for the heir of the family, that is the heir by the common law, and not one who is heir only by custom in some particular places (*z*). But that decision has been over-ruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate; for although the exception in the statute extend only to the eldest son, yet no law exists to oblige the heir in Borough English to bring in his lands. The statute contains no such requisition. It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime (*a*).

Thus must the surplus be distributed in case the intestate has left a wife and children, or representative of children.

(*q*) 3 P. Wms. 317. note (o). Elliott v. Collier, 1 Ves. 16. Garon v. Trippit, Ambl. 189. Elliott v. Collier, 3 Atk. 528.

(*r*) 3 Bac. Abr. 76. Swinb. p. 3. s. 18. Edwards v. Freeman, 2 P. Wms. 449.

(*s*) Holt v. Frederick, 2 P. Wms. 356.

(*t*) Edwards v. Freeman, 2 P. Wms. 440, 446.

(*u*) 2 P. Wms. 440.

(*w*) Vid. sup. 377.

(*x*) 3 Bac. Abr. 76. Swinb. p. 3. s. 18.

(*y*) Swinb. p. 3. s. 18.

(*z*) Per Sir Jos. Jekyl, M. R. Stra. 935.

(*a*) Per Lord Talbot, C. Lutwyche v. Lutwyche, Ca. Temp. Talb. 276. 4 Burn. Eccl. L. 345.

The statute then provides, that if there be no children or legal [382] representatives of them, in existence, a moiety shall go to the widow, and a moiety to the next of kindred, in equal degree, and their representatives; but no representation among collaterals shall be admitted farther than brothers' and sisters' children. If there be no widow, the whole shall go to the children. If there be neither widow nor children, then the whole shall be distributed among the next of kin, in equal degree, and their representatives, as above mentioned. (1)

The next of kin referred to by the statute are to be traced by the same rules of consanguinity as those who are entitled to letters of administration (*b*). Those rules have been already discussed (*c*).

The mother, therefore, as well as the father, succeeded to all the personal effects of the children who died intestate without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased; and such is the law still with respect to the father (*d*): but by the stat. 1 Jac. 2. c. 17. s. 7. if, after the death of the father, and in the lifetime of the mother, any of the children die intestate, without wife or children, every brother and sister, and their representatives, shall have an equal share with her. The principle of which provision is this, that otherwise the mother might marry, and transfer all to another husband (*e*).

[383] On this last-mentioned statute it has been held, that if A. die intestate, and without issue, leaving a wife, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And although there should be no brother or sister, yet if there be children of a deceased brother or sister, they shall partake with their grandmother to the same extent as their parent would have been entitled (*f*). But if there be neither brother nor sister, nor representative of a brother or sister, the case is without the statute, and the whole of such intestate's effects shall devolve, as before, to his mother (*g*). Also, by analogy to the sta-

(*b*) 2 Bl. Com. 515. Lloyd v. Tench, 2 Ves. 214.

(*c*) Vid. supr. 87.

(*d*) 2 Bl. Com. 513, 516. Evelyn v. Evelyn, Ambl. 192.

(*e*) Blackborough v. Davies, 1 Salk. 251. pl. 2. S. C. 1 P. Wms. 48, 49. S. C. Lord Raym. 684. Blackborough v.

Davis, Com. Rep. 26. pl. 95.

(*f*) Keylway v. Keylway, 2 P. Wms. 344. S. C. 1 Stra. 710. S. C. Gilb. Rep. 189. Stanley v. Stanley, 1 Atk. 455.

(*g*) 4 Burn. Eccl. L. 374. 11 Vin. Abr. 196.

(1) Under the intestate laws of *Pennsylvania*, if a man die intestate leaving neither widow nor lawful issue, nor father, brother, nor sister, but leaving a mother, real estate acquired by his father, and descending to him, goes to his relations on the part of the father, in exclusion of the relations on the part of the mother, in equal degree. *Devan v. Taylor*, 7 Serg. & Rawle, 397, overruling *Walker's Adm. v. Smith*, 3 Yeates, 480.

tute of distributions, such representation shall not be carried beyond brothers' and sisters' children (*h*). A mother-in-law of the intestate, it is clear, can claim no share in the distribution, she not being of his blood (*i*).

To return now to the statute of distributions. That clause of it which expresses that there shall be no representations among collaterals beyond brothers' and sisters' children, must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are remotely related to the intestate; for the intestate is the subject of the act: it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children, for [384] he is equally correlative to all (*k*). Therefore it has been held, that if the brother of an intestate hath a grandson, and a sister has a son, or daughter, the grandson shall not have distribution with the son or daughter of the sister (*l*). So it has been decreed, that if an intestate leave an uncle, and a deceased aunt's son, the latter shall have no distributive share (*m*). Thus though as we have seen (*n*), among lineals, representatives *ad infinitum* shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it.

The children of an intestate's brothers and sisters, who were deceased at his death, shall take *per capita*. Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased half-sister, the ten children of the deceased half-sister shall take ten parts in eleven with the son of the deceased brother (*o*).

The words of the statute must be taken together. The expression *pro suo cuique jure* will let in any advantage of equality or preference which a person was entitled by our law before the statute. Therefore a grandfather, although he be in an equal degree of consanguinity with the brother of the deceased, shall have no share with him in the distribution: for, by the common law, there was but one degree between brother and brother, and it would be unnatural to carry the personal estate up to the grandfather, who must be presumed to have been long before provided for, and to be going out of life (*p*).

So a grandfather shall exclude an uncle; and, independently of the provisions of the statute, by the common law the former was

(*h*) Stanley v. Stanley, 1 Atk. 457. 1 P. Wms. 25. Bowers v. Littlewood, 458. *ib. 595.

(*i*) Duke of Rutland v. Duchess of Rutland, 2 P. Wms. 216. (*l*) 1 Salk. 250. 1 Ld. Raym. 571. 1 P. Wms. 25. Com. Rep. 87.

(*k*) Carter v. Crawley, Raym. 496. (*m*) Bowers v. Littlewood, 1 P. Wms. 594.

Caldicot v. Smith, 2 Show. 286. Bee-ton v. Darkin, 2 Vern. 168. Maw v. Harding, ibid. 233. Pett v. Pett, 1 Salk. 250. S. C. Ld. Raym. 571. S. C. Com. Rep. 87. pl. 56. Pett's case, vid. supr. 90 and 91.

(*n*) Supr. 373.
(*o*) Ibid. 1 P. Wms. 595.

(*p*) Evelyn v. Evelyn, Ambler, 191.

entitled to a preference, as being of the right line, whereas the latter is only of the collateral line; in other words, the grandfather is [385] the root of the kindred, and the uncle is only the branch (*g*).

The law, of course, is the same in respect to grandmothers and aunts (*r*).

Where the next of kin are, a grandfather by the father's side, and a grandmother by the mother's, they shall take in equal moieties, as being in equal degree: for, in respect of such claims, as hath formerly been observed (*s*), dignity of blood makes no difference (*t*).

Uncles and nephews, aunts and nieces, are in equal degree. And where the intestate left two aunts, and a nephew and a niece, children of a deceased brother, Lord Hardwicke C. ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right and not by representation; but that if their father had been living, he would have been entitled to the whole (*u*).

The grand-daughter of a sister, and the daughter of an aunt of the intestate are also in equal degree, and entitled to equal distribution (*w*).

The next of kin, though collateral, is preferred before a relation, though lineal, if he be of the ascending line, and more remote (*x*).

[386] Although the statute direct that no distribution shall be made till a year be elapsed from the death of the intestate, yet, if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and shall go to his personal representative; for this proviso makes no suspension or condition, precedent to the interest of the parties, but was inserted merely with a view to creditors.

The statute, also, is in the nature of a will framed by the legislature for all such persons as die without having made one for themselves; and, by consequence, the parties entitled in distribution resemble a residuary legatee: and it has been always held, that if such legatee die before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (*y*). (1)

(*g*) *Blackborough v. Davis*, 1 Salk. 38. 251. S. C. Id. Raym. 684. S. C. Com. Rep. 96. 108, 109. S. C. 12 Mod. 615. *Lloyd v. Tench*, 2 Ves. 215. *Blackborough v. Davies*, 1 P. Wms. 41.

(*r*) Com. Dig. Admon. H. 1 Salk. 38. 251. *Woodroff v. Wickworth*, Prec. Ch. 527.

(*s*) Supr. 91.

(*t*) *Blackborough v. Davies*, 1 P. Wms. 53.

(*u*) *Durant v. Prestwood*, 1 Atk. 454.

(*w*) Com. Dig. Admon. H. Thomas v. Ketteriche, 1 Ves. 333.

(*x*) *Blackborough v. Davies*, 1 P. Wms. 51.

(*y*) 3 Bac. Abr. 75. *Brown v. Farnell*, Carth. 51, 52. *Freke v. Thomas*, Comb. 112. *Taylor v. Acres*, 2 Show. 285. *Palmer v. Allcock*, Skin. 213. 218. S. C. 5 Mod. 58. 11 Vin. Abr. 92. *Wilcocks v. Wilcocks*, 2 Vern. 559. 3 P. Wms. 49. note (*d*). *Lee v. Cox*, 3 Atk. 422. Vid. supr. 542.

(1) As to the meaning of "legal representative" under a bequest, see *Hardey*

Affinity, or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property : as, if A. have a son and a daughter, B. and C., and they both die, the former leaving a wife, and the latter a husband ; on A.'s dying afterwards intestate, such husband and wife have neither of them any claim on his estate.

Under a will, a wife is not one of the next of kin in the ordinary sense. Therefore where a testator gave the residue of his property "to be divided amongst my next of kin, as if I had died intestate," the widow was held not to be entitled to any share of such residue (z).

A gift of property to *my nearest surviving relations* has been held to mean the testator's brothers and sisters, to the exclusion of nephews and nieces (a).

If a bastard, or any other person having no kindred, die intestate, [387] without wife or child, his effects, as we have seen (b), belong to the king, who, with the exception of a small part, usually grants them by letters patent or otherwise ; and then such grantee seems of course entitled to the administration, and consequently to the sole enjoyment of the property (c).

The personal property of an intestate, wherever situated, must be distributed according to the law of the country where his domicile was, (1) and such is *prima facie* the place of his residence ; but that may be rebutted ; or supported by circumstances (d) ; for although the locality of the party's abode at the time of his death determine the rule of distribution, yet it must be a stationary, not an occasional, residence, in order that the municipal institutions may attach on the property (e). If, therefore, an Englishman be settled, and die in this country, and administration be taken out to him here, debts due to him, or other of his personal effects in *Scotland*, or abroad, shall be distributed according to the law of England (f) : But if an alien resident abroad die intestate, his whole property here is dis-

(z) *Garrick v. Lord Camden*, 14 Ves. jun. 372.

(a) *Smith v. Campbell*, Coop. Rep. 275.

(b) *Vid. sup.* 107.

(c) 2 Bl. Com. 505. Doug. 542.

(d) 2 Ves. jun. 198. See also Sir Chas. Douglas's case there cited.

(e) 1 Wooddes. 385. *Pipon v. Pipon*, Amb. 25. *Burn v. Cole*, ib. 415, 416.

(f) *Thorne v. Watkins*, 2 Ves. 35.

Lessee v. Fisher, 2 Yeates, 578. * And as to the meaning of the same words in the Act of 29th March, 1813, "for the relief of sundry landholders in the manor of Springettsbury in the county of York," (Pamph. Laws, 205.) and the Act of 21st December, 1784, sect. 9. giving the right of preemption, to certain lands on the west branch of Susquehanna river, to settlers and their legal representatives, (Carey & Bioren's Laws, vol. 3. p. 519.) see *Comm. v. Bryan*, 6 Serg. & Rawle, 81. *Duncan v. Walker*, 2 Dall. Rep. 205.

(1) *Guier v. O'Daniel*, 1 Binn. 349. *Harvey v. Richards*, 1 Mason's Rep. 381; and the cases there cited by Judge Story. *Williamson v. Smart*, Tayl. Rep. 219. Cam. & Norw. 146.

tributable according to the laws of the country where he so resides, otherwise no foreigner could deal in our funds but at the peril of his effects going according to our laws, and not to those of his own country (*g*).

Where a native of *England* domiciled in *Guernsey* died intestate, leaving a widow and infant children, and the widow was appointed guardian of the children by the royal court of *Guernsey*, and [388] sold the property of the intestate, and invested the produce in the *English* funds, and afterwards came to England with her children, and was domiciled there : A question arose on the death of some of the children under age, whether their shares of the property became distributable according to the law of *England* or of *Guernsey* ; and it was held, that the law of *England* was to govern the succession, the domicile of the children being (according to the opinion of foreign jurists, our own law being silent on the subject) to follow the domicile of the surviving parent, where no fraudulent intention can be imputed. But fraud may be presumed where no reasonable cause appears for the removal (*h*).

SECT. II.

Of distribution by the custom of London.

I PROCEED, in the last place, to consider the customs of the city of London on this subject, and also of the province of York, and the principality of Wales ; which having peculiar customs of distributing intestate's effects, are expressly excepted from the operation of the statute.

Although the restraints in regard to the power of making wills, which subsisted in those respective districts, are now removed by different statutes ; namely, the 4 & 5 *W. & M. c. 2.* explained by the 2 & 3 *Ann. c. 5.* for the province of York ; the 7 & 8 *W. 3. c. 38.* for Wales ; and the 11 *G. 1. c. 18.* for London ; by which persons residing in those several places, and liable to those customs, are empowered to dispose of all their personal estates by will, and the claims of the widows, children, and other relations to the contrary are totally barred ; yet those customs remain in full force with respect to such property of an intestate (*a*), or where the deceased freeman agreed by writing, in consideration of marriage or otherwise, that his personal estate should be distributed according to the same. Their nature and incidents therefore demand now our attention.

(*g*) 1 Wooddes. 585. *Pipon v. Pipon*, Rep. 67.
Ambl. 27.

(*a*) 2 Bl. Com. 493. 517, 518. L. of
(*h*) *Pottinger v. Wightman*, 3 Meri. Test. 194. 3 P. Wms. 19. in note.

[389] In the city of London (*b*), and in the province of York (*c*), as well as in the kingdom of Scotland (*d*), and therefore, probably also in Wales (*e*), (respecting the latter of which, little information is to be collected, except from the statute of *W.* 3.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient doctrine of the *pars rationabilis* (*f*), to which I have before alluded (*g*).

And first, as to the custom of London; if a freeman of the city die, leaving a widow and children, his personal property, after deducting her apparel, and the furniture of her bed chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. If only a widow, or only children, they shall respectively in either case take one moiety, and the administrator the other (*h*). If neither widow nor child, the administrator shall have the whole (*i*).

The portion of the administrator is styled in law the dead man's part. It is so called, because formerly, as we have seen (*k*), the ordinary or his grantee was to dispose of it in masses for the deceased's [390] soul. But, after the disuse of this superstitious practice, the administrator was wont to apply it to a better purpose, that is to say, for his own benefit (*l*); till the legislature thought it was capable of an application still better; and accordingly, by the stat. 1 *Jac.* 2. c. 17, it was declared, that it should be subject to the law of distributions.

Hence, if a freeman die worth eighteen hundred pounds personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; of which the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute; if he leave a widow and one child only, she shall still have eight parts as before; and the child shall have ten, six by the custom, and four by the statute; if he leave a widow and no child, the widow shall have three fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin (*m*).

A posthumous child shall come in for his customary share with the other children (*n*). But the custom extends merely to the

- (*b*) *Redshaw v. Brasier*, *Ld. Raym.* 3 *Atk.* 527.
 1329. 4 *Burn. Eccl. L.* 387.
 (*c*) 4 *Burn. Eccl. L.* 398.
 (*d*) *Ibid.* 421.
 (*e*) *Ibid.* 423, 442.
 (*f*) 2 *Bl. Com.* 518. *Off. Ex.* 97.
 (*g*) *Supr.* 81.
 (*h*) *Northey v. Strange*, 1 *P. Wms.* 341.
Regina v. Rogers, 2 *Salk.* 426.
Turner v. Jennings, 2 *Vern.* 612. *L.*
of Test. 210, 211. *Elliot v. Collier*,
 (*i*) *Percival v. Crispe*, 2 *Show.* 175.
Vid. L. of Test. 192.
 (*k*) *Supr.* 81.
 (*l*) *Anon.* 2 *Freem.* 85. *Mathews v.*
Newby, 1 *Vern.* 133.
 (*m*) 2 *Bl. Com.* 518. *L. of Test.* 209.
 (*n*) *Walsam v. Skinner*, *Prec. Chan.*
 499. *L. of Test.* 203. 11 *Vin. Abr.*
 209. *Gilb. Eq. Rep.* 155.

wife and children of the freeman, and not to his grandchildren (*o*).

Hence if a freeman die intestate leaving a wife but no child, yet if there hath been a child, and there be any legal representatives. [391] that is, lineal descendants of such child, they are admitted to his distributive share of the dead man's part under the statute, though they are entitled to no part of his share by the custom. In that case, therefore, of the dead man's part by the statute, the wife shall have one third, and the representatives shall have the other two thirds; so that, dividing the whole personal estate into six parts, she shall have four, and the representatives two.

If there be neither wife nor child, nor such representative of a child, the whole shall be subject to the statute of distribution (*p*).

The custom attaches, although the freeman neither resided, nor died (*q*), nor left property (*r*) within the city.

In respect to the widow, I have already mentioned that she is entitled to her apparel and the furniture of her chamber, which is called the widow's chamber (*s*); or, in lieu of it, in case the estate shall exceed two thousand pounds, it has been said that she is entitled to fifty pounds (*t*). The privilege of the widow's chamber is analogous to her right to paraphernalia in general cases, and, like that, shall in no case be exercised to the prejudice of creditors (*u*).

[392] If she be provided for by a jointure before marriage in bar of her customary part, she is put in a state of nonentity with regard to the custom only (*w*); but she shall still be entitled to her share of the dead man's part under the statute of distributions (*x*). But if the jointure is expressed to be in bar of her dower without saying more, this shall not bar her of her customary share of the personal estate, for land is wholly out of the custom (*y*). Such also is the case, if the intestate covenant to lay out money in a purchase of land by way of jointure, for the money has in equity all the qualities of land (*z*).

And *à fortiori* she shall not be excluded from her customary

(*o*) Northey v. Strange, 1 P. Wms. 341. Fowke v. Hunt, 1 Vern. 397. Regina v. Rogers, 2 Salk. 426. L. of Test. 210.

(*p*) L. of Test. 192. 221, 222. 1 Vern. 200.

(*q*) L. of Test. 202, 220. Spencer's case, 1 Roll. Rep. 316. Wilkinson v. Miles, 1 Sid. 259. Harwood's case, 1 Vent. 180. S. C. 1 Mod. 80. Rutter v. Rutter, 1 Vern. 180. Chomley v. Chomley, 2 Vern. 48. 82. Webb v. Webb, ib. 110.

(*r*) Priv. Lond. 283.

(*s*) 2 Bl. Com. 513.

(*t*) 7 Vin. Abr. 2. tit. Customs, B. 2. Briddle v. Briddle, 4 Burn. Eccl. L. 338.

(*u*) Swinb. p. 6. s. 13.

(*w*) Hancock v. Hancock, 2 Vern. 665. Blunder v. Barker, 1 P. Wms. 644. Cleaver v. Spurling, 2 P. Wms. 527. Lewin v. Lewin, 3 P. Wms. 16. Pusey v. Desbouverie, 315. Medcalf v. Medcalf, 1 Atk. 64. Morris v. Burroughs, 403. Tomkyns v. Ladbroke, 2 Ves. 592.

(*x*) Benson v. Bellasis, 1 Vern. 15. 2 Chan. Rep. 252. Withill v. Phelps, Prec. Ch. 327.

(*y*) 1 Ca. Abr. 158, 159. Babington v. Greenwood, 1 P. Wms. 531. Blunder v. Barker, 647. Babington v. Greenwood, Prec. Chan. 595. L. of Test. 214.

(*z*) S. C. 1 P. Wms. 532.

share, if the settlement be so expressed ; as if it contain a proviso, that she shall not be barred or deprived of her right to dower, or of taking any other gift, provision, or bequest her husband shall think fit to give, or leave her by deed or will, or any other means whatsoever (*a*). On the other hand, the settlement may be expressly in bar as well of her share of the dead man's part as of her share by the custom, and then she shall be excluded from both (*b*) : or if it be made in satisfaction of all her demands out of his personal estate by the custom, or otherwise, she shall be barred also of her share under [393] the statute (*c*) : or it may thus operate on the evident though only implied intention of the parties (*d*).

If the wife be divorced for adultery *à mensâ et thoro*, she forfeits her customary share (*e*).

If a freeman leave several children, the share or the orphanage part of any one of them is not vested in him by the custom till the age of twenty-one, after which period but not before, he may dispose of it by will, or, in case of his dying intestate, it shall be distributed pursuant to the statute. If he die under that age, whether sole or married, his share shall survive to the others (*f*) ; whereas the share by the statute is vested, and therefore such child may devise it at the age of fourteen, if a son, and at twelve if a daughter (*g*). But the survivorship of the orphanage part holds only as to the orphanage part belonging to the deceased himself, for if *he* had by survivorship the part of any of his brothers or sisters, that shall go according to the statute (*h*). In case there be only one child, his orphanage part is vested in him, in the same manner as his share by the statute, and is devisable by him at the same age (*i*). If a man [394] marry an orphan under the age of twenty-one, it seems his right is so vested as to prevent his wife's share from surviving, in case of her death, before she attains that age (*k*).

The children of a freeman are entitled to the benefit of the custom, although they were born out of the city (*l*).

If any of the children are advanced to the full extent of the custom by the father in his lifetime, they shall be entitled by the custom to no further dividend (*m*). If a freeman have several children, and fully advance them all, the custom in regard to them is satisfied,

(*a*) *Kirkman v. Kirkman*, 2 Bro. Ch. Rep. 95.

(*b*) 1 Eq. Ca. Abr. 153. *Atkins v. Waterson*, Gilb. Eq. Rep. 95. S. C. L. of Test. 214. *Babington v. Greenwood*, 1 P. Wms. 531.

(*c*) 7 Vin. Abr. 211. *Benson v. Belasis*, 1 Vern. 15. 4 Burn. Eccl. L. 404. Vid. L. of Test. 212, 213.

(*d*) L. of Test. 212. L. of Lond. 102.

(*e*) *Pettifer v. James*, Bumb. 16.

(*f*) 2 Bl. Com. 519. *Wilcocks v. Wilcocks*, 2 Vern. 558. *Jesson v. Es-*

sington, Prec. Ch. 207. 537.

(*g*) Vid. sup. 8.

(*h*) *Jesson v. Essington*, Prec. Ch. 537.

(*i*) 3 P. Wms. 318. note (q). Vid. also Prec. Chan. 207.

(*k*) *Fouke v. Lewen*, 1 Vern. 88. sed. vid. Prec. Ch. 537.

(*l*) L. of Test. 202. *Harwood's case*, 1 Ventr. 180. S. C. 1 Mod. 80.

(*m*) *Cleaver v. Spurling*, 2 P. Wms. 527.

and his personal estate, independent of the widow's customary share, shall be distributed according to the statute. If he has only one child, and fully advances him, the consequence is the same (*n*). If the children are advanced only partially, they must bring their portion into hotchpot before they can derive any advantage from the custom; and in that case their portion must be so brought in with the other brothers and sisters, but not with their mother, for the principle here also is to make an equality among the children, and not to benefit the widow (*o*). Nor, where a freeman has in part advanced his only child, shall such child bring in his advancement, [395] for there is none to claim with him of equal degree (*p*). And where one of several such children is advanced, his advancement shall be in satisfaction merely of his orphanage share, but not of his share of the dead man's part, to the whole of which he shall be entitled, without regard to what he shall have received from his father (*q*).

In case such advancement be brought into hotchpot, it must be brought into the orphanage part only (*r*).

If the advancement shall have exceeded the child's share by the custom, whether he must bring in such excess before he is entitled to his share of the part distributable by the statute, is a point on which there are opposite opinions. By some writers it has been held, that he has a claim to his full share by the statute, without any retrospect to his advancement, whatever might have been its amount. By others it has been maintained, that he has no right to such distributive share, unless he bring into the same so much of his advancement as exceeded his proportion of his customary part (*s*). To reconcile this variance, a distinction has been suggested between an advancement given and accepted expressly in satisfaction of the customary share, and an advancement given generally without any such agreement or stipulation: That, in the former case, in the distribution of the dead man's part, no respect shall be had to the [396] advancement, as it is considered in the light of a purchase by the child, and might have happened to be less as well as greater in point of value than the customary part. But where there is no such special contract or agreement, and the advancement is general, it shall be applied either to the customary share only, or both to the

(*n*) *L. of Test.* 206. 221. *Cleaver v. Spurling*, 2 P. Wms. 527. *Goodwin v. Ramsden*, 1 Vern. 200. *Hancock v. Hancock*, 2 Vern. 666. *Medcalf v. Medcalf*, 1 Atk. 64.

(*o*) *L. of Test.* 204. *Annard v. Honeywood*, 1 Vern. 545. *Beckford v. Beckford*, 2 Vern. 281. 2 Bl. Com. 519. *Bright v. Smith*, 2 Freem. 279. 1 Eq. Ca. Abr. 155. *Cleaver v. Spurling*, 2 P. Wms. 526. *Garron v. Trip-*

pet, Ambl. 189.

(*p*) *Regina v. Rogers*, 2 Salk. 426. *Fane v. Bence*, 2 Vern. 234. *Dean v. Lord Delaware*, ib. 628. *Stanton v. Platt*, ib. 754.

(*q*) *Hearne v. Barber*, 3 Atk. 211. *Wood v. Briant*, 2 Atk. 523.

(*r*) *Beckford v. Beckford*, 1 Vern. 315.

(*s*) *Vid.* 4 Burn. Eccl. L. 406. *Gudgeon v. Ramsden*, 2 Vern. 274.

customary and distributive share, according to the amount of the advancement (*t*).

As to the nature of the advancement, whether complete or partial, it must arise exclusively from the personal estate. In the establishment of the custom the citizens of London had no regard to real property, on supposition that a freeman would not purchase land, but would employ his whole fortune in commerce (*u*). If therefore a citizen settle a real estate on a child, it shall be no advancement (*w*); nor, although it be expressly for that purpose, shall it bar him of his orphanage part (*x*). Nor if money be given by the father to be laid out in land to be settled on the son on his marriage, shall it be deemed personal estate, nor any exclusion (*y*).

What has been already stated in general cases (*z*) respecting small presents made to the child by the father; his disbursements for the child's maintenance and education, or placing him out apprentice (*a*); a legacy left him by the father dying partially intestate (*b*): property given him by any other than his father, as well as a fortune of the child's own raising, is here equally applicable. He is not by any of these means advanced. For that purpose it must be a provision made for him by the father, while living, out of his personal property (*c*). In short, there must, in all instances of this nature, be a valuable consideration moving from the father, and an actual benefit accruing to the child (*d*). Indeed, it has been made a question whether such provision as shall amount to an advancement should not be made on marriage, or in pursuance of a marriage agreement (*e*). But, it seems, the custom on this head is not so restricted, but extends to any other establishment of the child in life (*f*).

If the child, whether the only one or not, be married in the lifetime of the father with his consent, although such child were not fully advanced, yet, to entitle himself to further portion, he must produce a writing under his father's hand, expressing the value of the advancement, in order that it may be ascertained what proportion it bore to his share by the custom (*g*). If no such writing be

(*t*) 4 Burn. Eccl. L. 207.

(*u*) 1 Eq. Ca. Abr. 150. Tomkyns v. Ladbroke, 2 Ves. 593.

(*w*) 1 Ch. Ca. 160. 235. L. of Test. 194. Tiffin v. Tiffin, 1 Vern. 2. Cox v. Belitha, 2 P. Wms. 274.

(*x*) 2 Ch. Ca. 160. vid. Civil v. Rich, 1 Vern. 216.

(*y*) Annand v. Honeywood, 1 Vern. 345.

(*z*) Vid. supr. 380.

(*a*) Sed vid. Morris v. Burroughs, 1 Atk. 403.

(*b*) Vid. Car v. Car, 2 Atk. 227.

(*c*) Laws of Lond. 82. Jenks v. Holford, 1 Vern. 61. 4 Burn. Eccl. L.

412. 415. Vid. Elliot v. Collier, 1 Ves. 17. Hearne v. Barber, 3 Atk. 213. 452. 3 P. Wms. 317. note (o). Elliot v. Collier, 1 Wils. 168.

(*d*) L. of Test. 204. Jenks v. Holford, 1 Vern. 61. Powke v. Lewen, 89. Civil v. Rich, 216. Morris v. Burroughs, 1 Atk. 403. Elliot v. Collier, 3 Atk. 528.

(*e*) 1 Vern. 61. 89. Vid. also Hearne v. Barber, 3 Atk. 213.

(*f*) L. of Test. 204. Morris v. Burroughs, 1 Atk. 403. See also Northey v. Strange, 1 P. Wms. 342.

(*g*) Chace v. Box, Ld. Raym. 484. 1 Eq. Ca. Abr. 154. 4 Burn. Eccl.

produced; or if, on the production of such writing, the specific amount does not appear on the face of it, such advancement shall [398] be presumed to have been complete, till the contrary be shewn (*h*). But mere parol declarations of the father, that he had fully advanced the child, whether with or without a specification of the value, shall be of no avail (*i*).

Thus, from what has been stated, it appears, that if a freeman die intestate, leaving no wife, and an only child, whether the child be fully advanced or partially advanced, or not advanced; in either of the cases the child was entitled to the whole personal estate (*h*). If he be fully advanced, he shall have nothing by the custom, but shall have all as next of kin: If he be partially advanced, since he has no brother or sister, with whom to bring his partial advancement into hotchpot, he shall have one half by the custom, and the other half by the statute: If he be not advanced, he shall have one half by the custom, and the other half by the statute (*l*).

If the freeman leave no wife, but several children, as for instance three, one of whom is advanced, another partly advanced, and the third not advanced; in this case the child partly advanced, and the child not advanced, after the former has brought in his partial advancement, shall share one half equally between them by the custom; and the other half, namely the dead man's part, although the first child have been fully advanced, shall, without his bringing his advancement into hotchpot, be distributed by the statute equally amongst them all.

[399] If such advancement exceeded his orphanage part, then, whether the excess shall go in satisfaction of his distributive share by the statute, or not, seems to depend on the provision being expressly in satisfaction of the orphanage part, or whether it be general, and without any stipulation (*m*).

The interest which a child has in such orphanage part is a mere contingency, and no present right, and therefore a release of it is not valid in point of law; but, if founded on a valuable consideration, shall operate as an agreement, and be binding in equity (*n*). Therefore, a freeman's child, if of age, may in consideration of a present fortune, waive all claim to the orphanage part: as where the father, on the marriage of his daughter who had attained twenty-one years, agreed to give her three thousand pounds, and she covenanted to receive that sum in full of such share: this, as there was no fraud in the transaction, was held in equity to be a good bar of the cus-

L. 393. L. of Test. 203. Hume v. Edwards, 3 Atk. 451, 452. Elliot v. Collier, 527. Fawkner v. Watts, 1 Atk. 406.

(*h*) Cleaver v. Spurling, 2 P. Wms. 527. 4 Burn. Eccl. L. 408. in note. Elliot v. Collier, 3 Atk. 527.

(*i*) Vid. Blunden v. Barker, 1 P. Wms. 634. Cleaver v. Spurling, 2

P. Wms. 527. Fawkner v. Watts, 1 Atk. 407.

(*k*) Vid. 4 Burn. Eccl. L. 417.

(*l*) Vid. 4 Burn. Eccl. L. 417.

(*m*) Vid. *supr*. 395.

(*n*) Blunden v. Barker, 1 P. Wms. 636. 639. Cox v. Belitha, 2 P. Wms. 273.

tom (*o*). So if A., who is of age, marry a freeman's daughter, who is an infant, he may, on receiving an adequate portion, bar himself of any future right to a customary estate in virtue of the marriage by a release of all future right, or by a covenant to release it when it shall accrue (*p*). Indeed, if the latter mode be adopted, the wife, if under age, would not be barred by the covenant; and in case of his death before the execution of the release, she would by [400] survivorship be entitled to the share, as a *chose* in action not recovered or received by her husband; but if he be living when the right accrues, as he clearly may release it, and his release will bind her, therefore it is reasonable he should perform his covenant. It is highly expedient that articles of this nature should be carried into execution; and that, when the father is bountiful to his children in his lifetime, he should have his affairs settled to his satisfaction at his death (*q*). But such release shall be altogether ineffectual if in any manner extorted, or obtained by undue influence (*r*), or without consideration (*s*).

These points are indeed less likely to occur, in consequence of the authority given to a freeman by the above mentioned stat. *Geo.* 1. of disposing by will of his whole personal estate, without regard to the custom.

SECT. III.

Of distribution by the custom of York—and of Wales.

THE custom of York, as it regards the widow, varies from that of London only in this respect, that she is allowed to reserve to her own use not only her apparel and furniture of her chamber, but al- [401] so a coffer box containing various ornaments of her person, as jewels, chains, and other articles of the like nature (*a*).

As relative to children, the custom of York differs in two material points from the custom of London. In the city, as we have seen, a child's orphanage part is fully vested till he attains the age of twenty-one. In the province it is vested immediately on the death of the intestate (*b*). In the city, we may remember, the advancement of a child cannot arise out of a real estate. In the pro-

(*o*) 2 Eq. Ca. Abr. 272. *Lockyer v. Burroughs*, 402. *Heron v. Heron*, 2 Atk. 161. *Blunden v. Barker*, 1 P. Wms. 639. *Cox v. Belitha*, 2 P. Wms. 273.

(*p*) *Cox v. Belitha*, 2 P. Wms. 272. *Ives v. Medcalf*, 1 Atk. 63.

(*q*) *Ibid.* 1 Atk. 63.

(*r*) *Heron v. Heron*, 2 Atk. 160. *Blunden v. Barker*, 1 P. Wms. 639.

(*s*) *Ives v. Medcalf*, 1 Atk. 63. *Mor-*

(*a*) Off. Ex. Suppl. 61, 62. *Swinb.* p. 6. s. 9.

(*b*) 2 Bl. Com. 519. 4 Burn. Eccl. 1. 328

vince the heir at common law, who inherits any land either in fee or in tail, is divested of all claim to any filial portion (*c*). And, however small in point of value the land may be in comparison with the personal estate, he is nevertheless excluded (*d*), and even although the estate he inherits be only a reversion (*e*). He is also barred, though the land devolved upon him by settlement made on his father's marriage (*f*). Nor, in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the [402] money to the administrator, it seems he shall be entitled to such portion, because then he has nothing by inheritance, nor in fact has had any preferment (*g*).

The principles established in regard to advancement on the construction of the statute of distributions apply in general to such as is pursuant to the custom of this district (*h*); but as here land as well as money constitutes an advancement, the heir at law under the custom is excluded by his inheritance of land, either in fee or in tail (*i*): whereas such inheritance is no bar by the statute; but, as well under the custom as under the statute, younger children in respect to advancement are on the same footing. It is essential in order to the custom of York's attaching, that the intestate should be resident, at the time of his death, within the province; but for that purpose it is immaterial where his estate is situated.

In case a freeman of London shall die within the province, the custom of the city for the distribution of his effects shall prevail, and shall controul the custom of the province of York. Therefore in that case the heir shall come in for a share of the personal estate; for the custom of the province is only local, and circumscribed to a certain district; but that of London, as above stated, follows the person, although ever so remote from the city (*k*).¹

[403] With these distinctions the custom of London and those of York in the main agree, and appear to be substantially the same (*l*).

Thus, if an intestate in the province of York die seized of an estate in fee-simple, leaving a widow and three sons; the widow in that case shall have one third of the whole personal estate under the custom, the other third shall be divided equally between the two younger sons, and of the remaining third the widow shall take one third under the statute, and the other two thirds shall be divid-

(*c*) 2 Burn. Eccl. L. 409. L. of Test. 221. Constable v. Constable, 2 Vern. 375.

(*d*) 4 Burn. Eccl. L. 409.

(*e*) Ibid. 409, 410.

(*f*) Ibid. 410. Constable v. Constable, 2 Vern. 375.

(*g*) 4 Burn. Eccl. L. 410.

(*h*) Vid. Elliot v. Collier, 1 Ves. 17.

(*i*) Constable v. Constable, 2 Vern. 375.

(*k*) 4 Burn. Eccl. L. 416. Chomley v. Chomley, 2 Vern. 47. 82. Supr. 391.

(*l*) 2 Bl. Com. 519. 1 Vern. 15. 134. 200. 305. 432. 465. 2 Ch. Rep. 255. L. of Test. 221, 222. Swinb. p. 3. s. 16. 1 Burn. Eccl. L. 398, et seq.

ed equally among the three sons; for the heir is barred merely of his orphanage part, but not of his share by the statute.

In respect to Wales (*m*), we may learn in general from the stat. 7 and 8 *W. 3. c.* 38. above referred to (*n*), that the doctrine of the *pars rationabilis* extends to intestates' effects within that principality ; but the books contain no further information on the subject.

(*m*) 4 Burn. Eccl. L. 424. Off. Ex. (n) Supr. 388.
97, in note. *ibid.* Suppl. 72.

CHAP. VII.

OF THE POWERS AND DUTIES OF LIMITED ADMINISTRATORS—OF
JOINT ADMINISTRATORS.

THERE are certain powers and duties which belong in common to all special and limited administrators. Whether the administration be committed *durante minoritate*, *durante absentia*, or *pendente lite*, or whether such special and limited administration be granted with or without a will annexed, or in a general or restrictive form only, as *ad usum et commodum infantis*; they are all invested in some respects with the same authority (*a*). They may perform all such acts as cannot be delayed without prejudice or danger to the estate. They may sell *bona peritura*, cattle which are fattened, grain, fruit, or any other substance which may be the worse for keeping (*b*): They may pay debts which were due from the deceased at the time of his death (*c*), or for the payment of them they may dispose of effects not perishable (*d*). They may also in [405] such respective characters receive debts due to the deceased (*e*), or may maintain actions for the recovery of the same (*f*): for, in all these and the like instances, the urgency of the case requires them immediately to act. They have also, it seems, the privilege of retaining for debts owing to themselves (*g*).

If administration be granted generally during infancy, the grantee has authority to make leases of any term vested in the infant executor, which shall be good till he come of age, and, as it has been also held, till he enter (*h*). Such administrator has also, it seems, a right, in case the administration were granted with the will annexed, to assent to a legacy (*i*). But if the administration were committed with special words of restraint in the form I have just mentioned, such administrator is incapable of making leases (*k*),

(*a*) Walker v. Woollaston, 2 P. Wms. 576. 3 Leon. 103.

(*b*) 3 Bac. Abr. 13. 11 Vin. Abr. 102, 103. 1 Roll. Abr. 910. Anon. 3 Leon. 278. 2 Anders. 132. pl. 78. Price v. Simpson, Cro. Eliz. 718. 5 Co. 9. Godb. 104.

(*c*) Com. Dig. Admon. F. Vid. Briers v. Goddard, Hob. 250. 5 Co. 29 b.

(*d*) 5 Co. 29 b. 2 Anders. 132. pl. 78.

(*e*) Com. Dig. Admon. F. Vid. Anon.

(*f*) Walker v. Woolaston, 2 P. Wms. 576. 1 Roll. Abr. 888. Bearblock v. Read, 2 Brownl. 83. Slaughter v. May, 1 Salk. 42. Ball v. Oliver, 2 Ves. and Bea. 97.

(*g*) Com. Dig. Admon. F. Semb. Raym. 483.

(*h*) 6 Co. 67. b. Off. Ex. 215.

(*i*) Off. Ex. 215. 5 Co. 29 b.

(*k*) 6 Co. 67 b. Off. Ex. 215.

or of assenting to a legacy (*l*). Nor shall the power of an administrator during infancy, although the grant were general, extend to the prejudice of the infant. Therefore such administrator has no authority to transfer the property by sale, except in cases of necessity; nor to sell leases even for the payment of debts, if there be [406] other property which he may dispose of to more advantage (*m*); nor to assent to a legacy, unless there be assets for its payment (*n*); nor to release a debt without actually receiving it (*o*): for although, as we may remember, if A. an infant be appointed executor, and B. be nominated to act in that character during A.'s minority, B. seems to be possessed of the same powers as an absolute executor (*p*); yet a distinction has been taken between him and an administrator *durante minoritate*. To B. the property in the effects was confided by the owner himself, though but for a limited time, and in a special manner; whereas such administrator is appointed by the ordinary in consequence of the legal disability of the executor, who by the will is constituted to act immediately (*q*). Such acts, therefore, as are performed by such administrator to the injury of the infant, shall be altogether ineffectual.

By the stat. 38 Geo. 3. c. 87. s. 7. an administrator *durante absentia* has the same powers vested in him as an administrator during the minority of the next of kin.

An administrator *pendente lite*, whether the suit relates to a will or the right of administration, seems to be on the same footing as an administrator during infancy, to whom the grant is made in the [407] special and limited manner above mentioned (*r*).

On an infant executor's coming of age, he may sue out a *scire facias* on a judgment recovered by the administrator *durante minoritate*. In like manner, in case an administrator, *pendente lite* touching a will, obtain such judgment, the executor, on proving the will, by which the administration will be determined, may take advantage of the judgment by *scire facias* (*s*).

If an action be brought against a special administrator, and, pending the action, the administration determine, it has been held he ought to retain assets to satisfy the debt, which is attached on him by the action (*t*); but that is on the supposition the action does not in that event abate; whereas it seems that such would be the consequence (*u*). (1) If judgment be obtained against such admin-

(*l*) Off. Ex. 215.

(*m*) 2 Anders. 132. pl. 78.

(*n*) 5 Co. 29 b.

(*o*) 1 Roll. Abr. 910, 911.

(*p*) Vid. supr. 357.

(*q*) Off. Ex. 215, 216. 11 Vin. Abr. 103.

(*r*) Vid. 3 Bac. Abr. 56. 11 Vin.

Abr. 106. Walker v. Woolaston, 2 P. Wms. 376, and supr. 74.

(*s*) Ib. 2 P. Wms. 587.

(*t*) 3 Bac. Abr. 14. Sparks v. Crofts, Comb. 465.

(*u*) 11 Vin. Abr. 97. Ford v. Glanville, Moore, 462. Goldsb. 13 Lutw. 342.

istrator, and afterwards the executor come of age, a *scire facias* will clearly lie against the executor on the judgment (*w*).

Of co-executors, we have seen (*x*), the acts of any one in respect to the administration of the effects are deemed by the law to be the acts of all, inasmuch as they have a joint and entire authority over the whole property ; but joint administrators have been considered in a different light. Their power arises not from the act of the deceased, but from that of the ordinary; and administration, it has been already stated (*y*), is in the nature of an office. Hence it has been held, that if granted to several persons, they must all join in the execution of it, nor shall the act of one only be binding on the rest, and that therefore one of several administrators [408] cannot, like one of several co-executors, convey an interest, or release a debt, without the others (*z*). But this distinction has been overruled, and it seems to be now settled that a joint administrator stands on the same footing, and is invested with the same powers, as a co-executor (*a*). (1)

If one of the administrators die, the right of administering will survive without a new grant (*b*).

By the stat. 38 *Geo.* 3. c. 87. s. 4. in case of the absence of an executor for a year after the testator's death out of the jurisdiction of his majesty's courts, and a suit be instituted in a court of equity by a creditor, the court in which the suit shall be pending is empowered to appoint persons to collect outstanding debts or effects due to the testator's estate, and to give discharges for the same, who are to give security in the usual manner duly to account.

(*w*) *Sparks v. Crofts*, Ld. Raym. 1 Atk. 460.
265. S. C. Carth. 432.

(*x*) Supr. 359.

(*y*) Supr. 114.

(*z*) 4 Burn. Eccl. L. 272. Ld. Bacon's Tracts, 162. *Hudson v. Hudson*,

(*a*) *Jacomb v. Harwood*, 2 Ves. 267.

Willand v. Fenn in B. R. cited *ibid*.

(*b*) *Adams v. Buckland*, 2 Vern.

514. *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 121. Supr. 114.

(1) *Murray v. Blatchford*, 1 Wend. Rep. 583. *Gage v. Johnson's Adm.* 1 M'Cord's Rep. 492.

CHAP. VIII.

OF ASSETS AS DISTINGUISHED INTO REAL AND PERSONAL, LEGAL
AND EQUITABLE—OF MARSHALLING ASSETS.

IN treating of debts and legacies, I have hitherto supposed them to be payable out of the personal estate only, and indeed that is the natural fund for their satisfaction ; but the real property may also be applied to the same purpose.

On the subject of such application, it is necessary to consider assets under different denominations. Assets, then, are either real or personal, legal or equitable (*a*).

Those of which I have been treating are legal and personal.

I proceed now to advert to such as are legal and real. Lands descended to the heir in fee-simple are for the benefit of specialty creditors of this description ; as is even an advowson which is so descended (*b*).

These assets are sometimes styled assets by descent, as personal [410] assets are called assets *enter mains*, that is, in the hands of the executor (*c*).

Whether an estate *pur auter vie*, in case it be not devised, shall be real or personal assets, depends on there being or not being a special occupant. The statute of frauds enables the proprietor of such estate to devise it, and enacts that, if no devise be made, it shall be chargeable in the hands of the heir, if it come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee-simple. And if there be no special occupant, it shall go to the executor, and be assets in his hands (*d*).

A term in gross is, as we have seen, personal assets (*e*). But if the term be vested in a trustee, and attendant on the inheritance, it is real assets (*f*). So a term in trust, attendant on a fee in trust, shall be real assets in the hands of the heir ; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all

(*a*) Vid. 4 Burn. Eccl. L. 288.

Westfaling v. Westfaling, 3 Atk. 466.

(*b*) 3 Wooddes. 483. Robinson v. Tonge, 3 P. Wms. 401.

Atkinson v. Baker, 4 Term Rep. 229.

Milner v. Lord Harewood, 18 Ves. 273.

(*c*) Terms of the Law, Shep. Touchst. 496.

(*e*) Supr. 140.

(*f*) 2 Fonbl. 2d edit. 114. note R.

(*d*) 2 Fonbl. 2d edit. 896. not. R. b.

Vid. supr. 5 and 137.

charges attending the inheritance, must be so also (*g*). But we have seen, that, generally speaking, the trust of a term is not made assets by that statute (*h*).

[411] Creditors by specialties, which affected the heir, provided he had assets by descent, had not the same remedy against the devisee of their debtor, and were therefore liable to be defrauded of their securities. To obviate this mischief (*i*), the stat. 3 *W. and M. c.* 14. has enacted, that all devises of real estates by tenants in fee-simple, or having power to dispose by will, shall, as against such creditors, be deemed to be fraudulent and void; and that they may maintain their actions jointly against the heir and devisee. But devises for payment of debts, and for raising portions for younger children, in pursuance of an agreement before marriage, are expressly excepted by the statute (*k*). And thus freehold interests devised for other than the just purposes aforesaid, are become, in favour of specialty creditors, real assets at law, without the assistance of a court of equity: in respect to which such creditors may elect to resort in the first instance against the heir and devisee, without suing the personal representative of their deceased debtor (*l*). If such creditor file a bill in equity on the statute to affect the real assets in the hands of the devisee, the heir must be made a party to the suit; for a bill in equity for that purpose is in the nature of an action at law; and as the action by express provision of the statute is to be brought jointly against the heir and devisee, so the bill must be filed against them both (*m*); though in such case the heir or devisee shall have this relief—namely, to stand in the place of the specialty creditor, and reimburse himself out of the personal estate (*n*). (1)

It seems that an estate *pur autre vie*, although no special occupant were named, would, in case it were devised, be considered as real assets (*o*).

But copyhold estates are not assets in the hands of the heir (*p*),

(*g*) 2 Fonbl. 2d edit. 114. note S. Herd. 489. Willoughby v. Willoughby, 1 Term Rep. 766.

(*h*) Supr. 143.

(*i*) Vid. 2 Bl. Com. 378.

(*k*) Vid. 2 Atk. 104, 292. Earl of Bath v. Earl of Bradford, 2 Ves. 590. Lingard v. Earl of Derby, 1 Bro. Ch. Rep. 311. Hughes v. Doublen, 2 Bro. Ch. Rep. 614. Com. Dig. Assets A.

(*l*) 3 Wooddes. 486. Warren v. Stat-

well, 2 Atk. 125. Madox v. Jackson, 3 Atk. 406. Knight v. Knight, 3 P. Wms. 333. Vid. Manaton v. Manaton, 2 P. Wms. 234.

(*m*) Gawler v. Wade, 1 P. Wms. 99.

(*n*) Clifton v. Burt, 1 P. Wms. 680.

(*o*) Vid. 2 Fonbl. 2d edit. 396. note b.

(*p*) 4 Co. 22. Robinson v. Tonge, cited 1 P. Wms. 679. note 1.

(1) In *Pennsylvania*, when a suit is brought against executors, the heirs of the testator, to whom land has descended, have a right to appear and take defence in the name of the executors, and thus protect their interest in the lands, which are assets for the payment of debts. *Fritz, Ex. v. Evans, Adm.* 13 Serg. & Rawle, 1.

[412] and consequently are not comprehended within the provisions of this statute.

Between legal and equitable assets the distinction is this : legal assets are such as constitute the fund for the payment of debts according to their legal priority ; whereas equitable assets are those which can be reached only by the aid of a court of equity, (1) and are subject to distribution on equitable principles, according to which, as equity favours equality, they are to be divided *pari passu* among all the creditors (q).

By the stat. 21 H. 8. c. 5. s. 5. it is enacted that if lands are devised to be sold, neither the money produced by the sale, nor the future profits of the land, shall be considered as forming any part of the personal estate of the devisor. But this provision was formerly construed to apply merely to devises of lands to be sold by persons not executors, or by executors in conjunction with other persons ; in which cases it was held, that neither the land nor the money was to be regarded as legal assets, but merely subject to an equitable appointment, inasmuch as the parties empowered to sell were not trusted with it in respect of their executorship (r).

[413] That in case lands were devised to an executor, to be sold by him in that capacity for the payment of debts and legacies, the money arising from the sale should be legal assets as well as the intermediate profits ; for that by the devise the descent was broken, and the estate in the land vested in the executor, *quà* executor for the purposes directed by the will (s). (2)

But the doctrine of equitable assets, in its principle so consonant to natural justice, has been gradually extended ; and this distinction between a devise to a trustee and to an executor has been continually qualified, till at length it appears to be altogether abolished.

In one class of cases, both of an earlier and of a later date, courts of equity recognizing the union of the two characters of trustee and executor in the devisee, regarded on that ground the real estate

(q) 3 Bac. Abr. 59. in note. 2 Fonbl. 402. note (d). 4 Burn. Eccl. L. 288. 3 Wooddes. 486. 2 P. Wms. 416. note 2.

63. Anon. 2 Vern. 405. 4 Burn. Eccl. L. 260. 11 Vin. Abr. 291. Cutterback v. Smith, Prec. Chan. 127. Sed vid. Off. Ex. 74, 75.

(r) 3 Bac. Abr. 58. Roll. Abr. 920. Edwards v. Graves, Hob. 265. Dyer. 151 b. 264 b. Girling v. Lee, 1 Vern.

(s) 3 Bac. Abr. 58. 1 Roll. Abr. 920. Hargr. Co. Litt. 236.

(1) *Rutledge v. Rutledge's Creditors*, 1 McCord's Cha. Rep. 469.

(2) Testator orders his executors, after the death of his widow, to sell his real and personal estate, and divide the money equally among his four children. On a sale of the land made by an administrator *de bonis non*, after the death of the widow, such administrator is entitled to receive the money, and not a creditor who had obtained judgment against one of the children before a sale. *Allison, Ex. v. Wilson's Ex.* 13 Serg. & Rawle, 339.

as merely a trust fund, and distributable among all the creditors equally (*t*). And other cases considered it in the same light, although the devise were not to the executor expressly on trust, if, according to the sound construction of the will, he might be converted into a trustee; as if the devise were to him and his heirs; since the money could never be legal assets in the hands of his heir; nor, as [414] against such heir, could an action be maintained by a creditor (*u*).

According to other decisions, if the executor had only a naked power to sell in the capacity of executor, the lands descended in the mean time to the heir of the devisor, and till the sale, he might enter and take the profits (*w*); (1) and the money arising from such sale was held to be assets at law (*x*).

But by modern adjudications it seems to be established that a devise to a mere executor shall bear the same construction as a devise to a trustee; that there is no reason to suppose the testator's meaning to be different in the one instance from that in the other; and that, even in the case of a mere power on the part of the executor to sell, the descent seems to be broken, inasmuch as the vendee is in by the devisor; but that, whether the descent in such case be broken or not, the assets shall be equally equitable: in short, that if the real estate be by any means given to the executor, the produce of it, when sold, shall not be applied in a course of legal administration, but be distributed as equity prescribes (*y*). (2)

And although it has been held that where the estate descends to [415] the heir charged with the payment of debts, it will be legal assets in him (*z*); yet now it is settled that in this instance also the assets shall be deemed to be equitable (*a*).

But such assets as are clearly legal shall not assume, by being

(*t*) 2 P. Wms. 416. note 2. 2 Fonbl. 402, 403. Anon. 2 Vern. 133. Challis v. Casborne, Prec. Chan. 408. Chambers v. Harvest, Mose. 123. Anon. 328. Lewin v. Okcley, 2 Atk. 50. Batson v. Lindegreen, 2 Bro. Ch. Rep. 94.

(*u*) 1 Bro. Ch. Rep. Append. 7. 1 Bro. Ch. Rep. Newton v. Bennet, 135, 138. in note.

(*w*) Co. Litt. 236.

(*x*) Newton v. Bennet, 1 Bro. Ch. Rep. 135, 138. in note. See Tomlinson v. Dighton, 1 P. Wms. 151.

(*y*) Newton v. Bennet, 1 Bro. Ch. Rep. 137, 138. 2 Fonbl. 2d edit. 398. in note. Vide Hargr. Co. Litt. 113. note 2. and Walker v. Meager, 2 P. Wms. 552.

(*z*) Freemoult v. Dedire, 1 P. Wms. 430. Plunket v. Penson, 2 Atk. 290. 2 P. Wms. 416. note 2.

(*a*) 2 Fonbl. 2d edit. 398. in note. 1 Bro. Ch. Rep. Append. 6. Batson v. Lindegreen, 2 Bro. Ch. Rep. 94. Shiphard v. Lutwidge, 8 Ves. jun. 26.

(1) In *Pennsylvania*, under the provisions of the Act of 31st March, 1792, (Purd. Dig. 277. 3 Sm. Laws, 67.) the executors, where a naked power to sell is given to them, take the legal estate, and nothing descends, unless the contrary is specially directed by the testator. *Allison, Ex. v. Wilkon's Ex.* 13 Serg. & Rawle, 332.

(2) *Nimmo's Ex. v. The Commonwealth*, 1 Hen. & Munf. 17. *Batson v. Le Roy*, 3 Johns. Cha. Rep. 651.

recoverable only in equity, an equitable nature. Hence, if a mere trust estate descend on the heir at law, notwithstanding a necessity of resorting to equity to reduce it into possession, yet it shall be legal assets, since a trust estate is made assets by the statute of frauds. And although an equity of redemption of a mortgage in fee, not being made assets by any legislative provision, has been considered as merely an equitable interest, and has been expressly adjudged to be equitable assets (*b*) ; (1) yet there are strong opinions to the contrary, and that an equity of redemption, even in fee, though capable of being reached only in equity, shall be classed among assets at law. And although, from the same inclination of extending the ideas of equitable assets, it has been also held that if any termor for years mortgage his term, the equity of redemption shall be of that description of assets (*c*) ; still, according to a variety of antecedent cases, such chattels, whether real or personal, as [416] are mortgaged or pledged by the testator, and redeemed by the executor, although capable of being recovered only in equity, shall be assets at law in the hands of the executor for the value beyond the sum paid for the redemption (*d*).

Lands may be devised to an executor to be sold by him for the payment of debts only, and then they shall be assets merely for that purpose. And so the devise may be expressed to be for the payment of legacies, and not of debts ; and then it shall be restricted to the former. For since the lands are not in their own nature assets, but constituted so by the will and disposition of the deviser, they shall not be assets to a greater extent than he has thought fit to direct (*e*).

But in either of these cases, as I shall presently shew, the assets may be marshalled.

Where money by a marriage agreement is article'd to be invested in land and settled, such fund should be bound by the articles, and not be assets, either at law or in equity, for payment of debts (*f*).

- (*b*) *Wilson v. Fielding*, 2 Vern. 764. 155. *Harcourt v. Wrenham*, Moore, 858. *Plunket v. Penson*, 2 Atk. 294. 1 Roll. Rep. 158. *Harcourt v. Wrenham*, v. Deg, 2 P. Wms. 416. *Cox's case*, 3 1 Brownl. 76. *Plunket v. Penson*, 2 P. Wms. 342. *Hartwell v. Chitters*, Atk. 291. *Ambly*. 308. 3 Bac. Abr. 59. in note. (*e*) Off. Ex. 74.
(*c*) *Cox's case*, 3 P. Wms. 342. (*f*) *Lechmere v. Earl of Carlisle*, *Hartwell v. Chitters*, *Ambly*. 308. 3 P. Wms. 217.
(*d*) 3 Bac. Abr. 59. in note. 1 Leon.

(1) The administrator of a mortgagor is not, *as such*, entitled to the surplus moneys arising from the sale of the mortgaged premises ; but it is considered as part of the real estate, and goes to the heirs, and will be *assets* in their hands ; and the heirs being before the Court by their parent, it was ordered to be distributed, as *equitable assets*, among all the creditors *pari passu*. But as the creditor has a remedy at law, in *New York*, against an equity of redemption, it is questionable, whether *before a sale* of the mortgaged premises it could be deemed equitable assets. *Moses v. Murgatroyd*, 1 Johns. Cha. Rep. 119.

An estate in fee in our American plantations is subject to debts, and considered as a chattel till the creditors are satisfied, when the lands shall descend to the heir (*g*).

By the stat. 47 *G. 3. s. 2. c. 74.* it is enacted that a trader dying seised of, or entitled to, any estate, or interest in lands, tenements, hereditaments, or other real estate, which before the passing of the act would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same should be assets to be administered in courts of equity, for the payment of all just debts of such person, as well debts due on simple contract, as on specialty; but specialty debts are to be first paid (*h*).

[417] By the stat. 5 *G. 2. c. 7. § 4.* it is enacted that houses, land, negroes, and other hereditaments, and real estates situate within any of the British plantations in America belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall be assets for the satisfaction thereof in like manner as real estates are liable to the satisfaction of debts due by bond, or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity in any of such plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of any such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seised, extended, sold, or disposed of for the satisfaction of debts. (1)

The marshalling of assets remains now to be considered.

The personal assets of the testator shall in all cases be primarily applied in discharge of his personal debts or general legacies, unless he exempt them by express words or manifest intention (*i*); a declaration plain, or necessary inference, tantamount to express words (*k*).

(*g*) 11 *Vin. Abr.* 223. *Noel v. Robinson*, 2 *Ventr.* 358. *Blankard v. Galdy*, 4 *Mod.* 226. 4 *Burn. Eccl. L.* 195. *Manning v. Spooner*, 3 *Ves. jun.* 118.

(*h*) The above stat. applies only to persons who were traders at the time of their decease; and not to persons who have left off trade before they died.—*Hitchon v. Bennet*, 4 *Madd. Rep.* 180.

(*i*) 1 *P. Wms.* 294. note 1. *Heath v. Heath*, 2 *P. Wms.* 366. *Walker v. Jackson*, 1 *Wils.* 24. *S. C.* 2 *Atk.* 624. *Bridgman v. Dove*, 3 *Atk.* 202. *Haslewood v. Pope*, 3 *P. Wms.* 324. 1 *Bro. P. C.* 192. *Bunb.* 302. *Lord Inchiquin*

v. French, *Amb.* 33. *S. C.* 1 *Wils.* 82. *Samwell v. Wake*, 1 *Bro. Ch. Rep.* 144. *Duke of Ancaster v. Mayer*, *ib.* 454. *Bamfield v. Wyndham*, *Prec. in Ch.* 101. *Wainwright v. Bendlowes*, 2 *Vern.* 718. *S. C. Amb.* 581. *Webb v. Jones*, 2 *Bro. Ch. Rep.* 60. *Vid. also* 3 *Bac. Abr.* 85. 2 *Fonbl.* 290. note (a). *Reade v. Litchfield*, 3 *Ves. jun.* 475.

(*k*) *Bootle v. Blundell*, 1 *Meri. Rep.* 193. and 19 *Ves.* 494. *S. C.* *Greene v. Greene*, 4 *Madd. Rep.* 148. *Gittins v. Steele*, 1 *Swans.* 24. *Tower v. Lord Rous*, 18 *Ves.* 132.

(1) Lands descending in another state are not assets in *Massachusetts*. *Austin v. Gage*, 9 *Mass. Rep.* 395.

[418] A devise of all the real estate, subject to the payment of debts, will not alone exonerate the personal estate; and even if the testator direct the real estate to be sold for the payment of debts, the personal estate shall be applied in exoneration of the real (*l*); (1) and it shall be thus applied, although the personal debt be secured by mortgage, and whether there be or be not a bond or covenant for payment (*m*). So lands subject to or devised for payment of debts shall be liable to discharge such mortgaged lands either descended or devised (*n*), and although the mortgaged lands be devised expressly subject to the encumbrance (*o*). So lands descended shall exonerate mortgaged lands devised (*p*). So unencumbered lands and mortgaged lands, both specifically devised, but expressly after payment of *all* debts, shall contribute to the discharge of the mortgage (*q*): (2) In all these cases the debt is considered as the personal debt of the testator himself, and therefore a charge on the real estate merely collateral.

But a different rule prevails where the charge is on the real estate principally, and the personal security is only collateral (*r*): [419] As where a husband on his marriage covenants to settle lands and to raise a term of years out of them for securing portions, and also gives a bond for the performance of the covenant; for in such case the land-holder enters into such covenant relying on the land to enable him to discharge it; nor does the money raised increase the personal estate, but is to exonerate the rest of his real (*s*). So where the debt, although personal in its creation, was contracted originally by another (*t*): As where an estate is

(*l*) *Fereyes v. Robertson*, Bunb. 301. *Bond v. Simmons*, 3 Atk. 20. *Haslewood v. Pope*, 3 P. Wms. 322. 2 Eq. Ca. Abr. 493.

(*m*) *Cope v. Cope*, 2 Salk. 449. *Howcl v. Price*, 1 P. Wms. 291. *Pockley v. Pockley*, 1 Vern. 36. 436. *King v. King*, 3 P. Wms. 360. *Galton v. Hancock*, 2 Atk. 436. *Robinson v. Gee*, 1 Vez. 251. 6 Bro. P. C. 520. *Philips v. Philips*, 2 Bro. Ch. Rep. 273.

(*n*) *Bartholomew v. May*, 1 Atk. 487. *March. of Tweeddale v. Coverley*, 1 Bro. Ch. Rep. 240.

(*o*) *Serle v. St. Eloy*, 2 P. Wms. 386.

(*p*) *Galton v. Hancock*, 2 Atk. 424.

(*q*) *Carter v. Barnardiston*, 1 P. Wms. 505. 2 Bro. P. C. 1.

(*r*) *Edwards v. Freeman*, 2 P. Wms. 437. 664. in note. *Ward v. Lord Dudley and Ward*, 2 Bro. Ch. Rep. 316. *Leman v. Newnham*, 1 Ves. 51. *Lewis v. Mangle*, Amb. 150.

(*s*) 2 Fonbl. 292. note b. *Edwards v. Freeman*, 2 P. Wms. 435.

(*t*) *Cope v. Cope*, 2 Salk. 449. *Bagot v. Oughton*, 1 P. Wms. 347. *Leman v. Newnham*, 1 Vez. 51. *Robinson v. Gee*, ib. 251. *Lacam v. Mertins*, ib. 312. *Parsons v. Freeman*, Amb. 115. 2 P. Wms. 664. in note. *Lawson v. Hudson*, 1 Bro. Ch. Rep. 58. *Earl of Tankerville v. Fawcett*, 2 Bro. Ch. Rep. 57. *Tweddle v. Tweddle*, ib. 101. 152. *Billinghurst v. Walker*, ib. 604.

(1) *Shelby v. The Commonwealth*, 13 Serg. & Rawle, 348. *Todd v. Todd's Ex.* 1 Serg. & Rawle, 453. 2 Dall. Rep. 244. *Hall v. Hall*, 2 M'Cord's Ch. Rep. 302. *McKay v. Green*, *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 57. 312. *Seaver v. Lewis*, 14 Mass. Rep. 83.

(2) The order of marshalling assets towards payment of debts is, 1. The personal estate; 2. Lands descended; 3. Lands devised. *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 313. *Hall v. Hall*, 2 M'Cord's Ch. Rep. 303. *Shelby v. The Commonwealth*, 13 Serg. & Rawle, 348. *Hays v. Jackson*, 6 Mass. Rep. 151.

bought subject to a mortgage, the personal estate of the purchaser shall not be applied in exoneration of the real estate, unless he appeared to have intended to make the debt his own (*v*); (1) but a mere covenant for securing the debt will not be sufficient for that purpose (*v*). (2)

With respect to the priority of the application of real assets, when the personal estate is either exempt or exhausted, it seems that first the real estate expressly devised for the purpose shall be applied; secondly, to the extent of the specialty debts, the real estate descended; 3dly, the real estate specifically devised subject to a general charge of debts (*w*).

As it is the object of a court of equity, that every claimant on the assets of the deceased shall be satisfied, so far as that purpose can be effected by any arrangement consistent with the nature of the respective claims of creditors, it has been long settled, that where A. a creditor has more than one fund to resort to, and B. another creditor, only one, A. shall resort to that fund on which B. has no lien (*x*). (3) If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of such specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt (*y*). (4)

The same marshalling of assets may also take place in favour of legatees. As against assets descended they shall have the same

(*u*) 2 Fonbl. 202. note b. *Pockley v. Lewis*, 2 Bro. Ch. Rep. 257. 261. in *Pockley*, 1 Vern. 36. 6 Bro. P. C. 520. note, 259. in note. *Manning v. Spooner*, 3 Ves. jun. 117.

(*v*) *Bagot v. Oughton*, 1 P. Wms. 347. (*x*) 1 P. Wms. 679. note 1. *Lanoy v. Duke of Athol*, 2 Atk. 446. *Lacani v. Mertins*, 1 Vez. 312. *Mogg v. Hodges*, 2 Vez. 53.

Forrester v. Lord Leigh, Ambl. 171. (*y*) 2 Ch. Ca. 4. *Sagittary v. Hyde*, *Earl of Tankerville v. Fawcett*, 2 Bro. Ch. Rep. 58. *Tweddell v. Tweddell*, 1 Vern. 455. 1 Eq. Ca. Abr. 144. *Wil-*
ib. 152. *Billingham v. Walker*, *ib.* son v. *Fielding*, 2 Vern. 763. *Galton*
604. *v. Hancock*, 2 Atk. 436. 3 Wooddes.
489.

(*w*) 1 P. Wms. 294. note 1. *Galton v. Hancock*, 2 Atk. 424. *Doune v.*

(1) 9 Serg. & Rawle, 73. The devisee of unpatented lands belonging to the testator, has no right to call upon the personal estate of the testator to pay the purchase money and fees of patenting the land. *Case of John Keysey, Ex. of Keysey*, 9 Serg. & Rawle, 71.

(2) *Gumberland (Duke of) v. Codrington*, 3 Johns. Cha. Rep. 229.

(3) *Cheeseborough v. Millard*, 1 Johns. Cha. Rep. 409. *Greenwood v. Bocquet's Ex.* 2 Bay's Rep. 87. *Fowler v. Burksdale*, Harp. Eq. Rep. 164.

(4) *Haydon v. Good*, 4 Hen. & Munf. 460. So a surety who pays a specialty debt, due by the intestate, has a right to stand in the place of the specialty creditor, and be paid such portion of the assets as the specialty creditor would have been entitled to. *Dorsheimer v. Bucher, Adm.* 7 Serg. & Rawle, 9.

equity: Thus where lands are subjected to the payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets (*z*). So, where legacies [421] by the will are charged on the real estate, but not the legacies by the codicil; the former shall resort to the real assets on a deficiency of such as are personal to pay the whole (*a*). So, although a specialty creditor may elect to have his debt out of the hands of the heir or of the devisee, yet, as we have seen, the heir or devisee shall in such case stand in the place of such creditor, and reimburse himself out of the personal estate (*b*). (1)

But the principles of these rules will not admit of their being applied in aid of one claimant, so as to defeat another. And, therefore, a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, though he shall as against lands descended (*c*). Yet such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised (*d*); for the application of the personal assets in case of the real estate mortgaged (*e*), does not take place to the defeating of any legacy, either specific or pecuniary (*f*). A legatee shall also stand in the place of a specialty creditor, who has exhausted the personalty, as against a residuary devisee of the real and personal estate, because he has only the rest and residue (*g*).

Nor do any of the rules above mentioned subject any fund to a claim to which it was not before liable, but only provide that the election of one claimant shall not prejudice the claims of the [422] others (*h*). Thus, where A., seised of freehold and copyhold lands, mortgaged them in his lifetime, and died indebted by mortgage, and on several bonds, the specialty creditors urged the court, in marshalling the assets to cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate: yet the court held, that as copyhold estates were not liable, either at law or in equity, to the testator's debts, farther than he subjected them to the same, the copyhold estate should bear its proportion with the freehold estate

(*z*) Haslewood v. Pope, 3 P. Wms. Ambler 171.
323.

(*a*) 3 Ch. Rep. 83. Masters v. Masters, 1 P. Wms. 422. Bligh v. Earl of Darnley, 2 P. Wms. 620.

(*b*) Clifton v. Burt, 1 P. Wms. 680.

(*c*) Herne v. Meyrick, 1 P. Wms. 201. Clifton v. Burt, 678. Haslewood v. Pope, 3 P. Wms. 324.

(*d*) Lutkins v. Leigh, Cal. Temp. Talb. 53. Forrester v. Lord Leigh,

(*e*) Vid. Howel v. Price, 1 P. Wms. 294.

(*f*) Oneal v. Mead, 1 P. Wms. 693. Tipping v. Tipping, ib. 730. Davis v. Gardiner, 2 P. Wms. 190. Rider v. Wager, ib. 335.

(*g*) Handby v. Roberts, Ambler 129.

(*h*) Galton v. Hancock, 2 Atk. 438. Lacum v. Mertins, 1 Vez. 312.

(1) See *ante*, page 411, n. (1).

for payment of the mortgage, but should not be liable to make satisfaction for the specialty debts (*i*). But this case, as being quite anomalous and irreconcilable with all principle, has been lately overruled (*k*).

Where a testator, having both freehold and copyhold estates, charges *all his real* estate with payment of his debts, if he *has* surrendered the copyhold to the use of his will, the freehold and copyhold shall be applied rateably; but if he *has not* surrendered the copyhold, it shall not be applied until the freehold is exhausted (*l*).

If a legacy be given out of a mixed fund of real and personal estate, payable at a future day, and the legatee die before the day of payment, it is doubtful whether the court will marshal the assets, so as to turn such legacy on the personal estate: in which case it would be vested and transmissible; but, as against the real estate, it would sink by the death of the legatee (*m*).

As against real assets descended, the wife shall stand in the place of specialty creditors for the amount of her paraphernalia (*n*); but, [423] whether she shall be so entitled as against real assets devised, seems to be a point unsettled (*o*), excepting in the case of a real estate charged with payment of debts in aid of the personal estate, in which the court decreed her paraphernalia to the wife, in prejudice of the charged estate (*p*).

A court of equity will not marshal assets in favor of a charitable bequest, so as to give it effect, out of the personal chattels, it being void so far as it touches any interest in land (*q*).

Under a devise of real and personal estate in trust to pay debts and legacies, some of which were void under the stat. 9 *Geo. 2. c.* 36. as a charge of charity legacies upon the real and leasehold estates and money on mortgage; on a deficiency of assets the other legatees were preferred to the heir (*r*).

* (*i*) *Robinson v. Tonge*, cited 1 P. Wms. 679. note 1., and *vid. supr.* 411. and 2 *Vez.* 271.

(*k*) *Aldrich v. Cooper*, 8 *Ves. jun.* 382. See also *Trimmer v. Bayne*, 9 *Ves. jun.* 209. And in *Tomlinson v. Ladbroke*, at the Roll's sittings after Hil. T. 1809, Sir Wm. Grant, M. R. held clearly that the assets should be marshalled as against a copyhold estate.

(*l*) *Growcock v. Smith*, 2 *Cox's Rep.* 397.

(*m*) *Prowse v. Abingdon*, 1 *Atk.* 482. and *Pearce v. Taylor*, before Lord Thurlow, C. Trin. Vac. 1790, cited 1 P. Wms. 679. note 1.

(*n*) *Tipping v. Tipping*, 1 P. Wms.

729. *Snelson v. Corbet*, 3 *Atk.* 369. *Graham v. Londonderry*, *ib.* 393.

(*o*) 2 P. Wms. 554. note 1. *Probert v. Clifford*, *Anbl.* 6. *Inledon v. Northcote*, 3 *Atk.* 438. 3 *Bac. Abr.* 87. *Lord Townsend v. Windham*, 2 *Ves.* 7. *Vid. supr.* 231.

(*p*) *Boyntun v. Boyntun*, 1 *Cox's Rep.* 106.

(*q*) *Mogg v. Hodges*, 2 *Vez.* 52. *Attorney General v. Tyndall*, *Anbl.* 614. *Foster v. Blagden*, *ib.* 704. *Hillyard v. Taylor*, *ib.* 713. 3 *Wooddes.* 489. note (g). *Mogg v. Hodges*, 1 *Cox's Rep.* 7. and other cases in the same work.

(*r*) *Currie v. Pye*, 17 *Ves. jun.* 162

CHAP. IX.

OF A DEVASTAVIT.

HAVING thus discussed what belongs to the discharge of an executor's duty, I am now to consider, what shall amount to such a violation or neglect of it as shall make him personally responsible.

This species of misconduct is styled in law a *devastavit*; that is, a wasting of the assets (*a*).

And where an executrix in respect of her receipts as such, was considerably indebted to the estate, an annuity to which she was entitled under the will, was ordered as it became due, to be applied in payment of such debt, and her solicitor was declared to have a lien for his taxed costs, upon any payment of the annuity to which she might be entitled, after payment of what was due to the estate (*b*).

An executor may incur this charge in a variety of modes, not only by plain and palpable acts of abuse, as giving away, embezzling, or consuming the property, without regard to debts or legacies; but also by misapplying it in extravagant expences in the funeral (*c*); in the payment of debts out of their legal order, to the prejudice of such as are superior; or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors (*d*). Or by disbursements in the schooling, feeding, or cloathing of an intestate's children subsequently to his decease (*e*).

So if the executor release or cancel a bond due to the testator, or [425] deliver it to the obligor, this shall charge him to the amount of the debt, whether in point of fact he received it or not (*f*). If he release a cause of action accrued in right of the testator, whether before or subsequently to the testator's death, this also will generally speaking (*g*), be a *devastavit* (*h*). If he submit to arbitration a debt, or any other demand he may be entitled to in right of the testator, and the arbitrator do not award him a recompence to the full value, this, as being his own voluntary act, shall bind him to answer

(*a*) Off. Ex. 157. 3 Bac. Abr. 77. Com. Dig. Admon. 1. l. 11 Vin. Abr. 306.

(*b*) Skinner v. Sweet, 3 Madd. Rep. 344.

(*c*) Vid. supr. 246.

(*d*) Off. Ex. 138.

(*e*) Giles v. Dyson, 1 Starkie, 52.

(*f*) Off. Ex. 159. 1 Nels. Abr. 262.

(*g*) Sed vid. inf. 429.

(*h*) Off. Ex. 71. 159. Chandler v. Thompson, Hob. 266. And. 138. Brightman v. Knightley, Cro. Eliz. 43.

the difference (*h*). If an executor take an obligation in his own name for a debt due by simple contract to the testator, he shall be equally chargeable as if he had received the money ; for the new security has extinguished the old right, and is *quasi* a payment (*i*). If, in the character of an executor, he commence an action in which he has a right to recover, and afterwards agree with the defendant to receive a specific sum at a future day as a compensation, and the party fail to pay it, the executor, in that case, is liable on a *devastavit* for the value (*k*). Thus, where the executor of an obligee took in payment a bill of exchange drawn on a banker for the money, who accepted the bill, and before payment failed ; on the executor's afterwards bringing an action on the bond, and this matter being disclosed in evidence, it was held to be a payment (*l*). So, if an [426] executor pay money in discharge of an usurious bond, or any other usurious contract entered into by the testator, it shall involve him in the same consequences (*m*).

Such acts also of negligence and careless administration as tend to defeat the rights of creditors, or legatees, fall under the same denomination. As if the executor delay the payment of a debt payable on demand with interest, and suffer judgment for principal and interest incurred after the testator's death ; unless he can shew that the assets were insufficient to discharge the debt immediately (*n*), he shall be held guilty of a *devastavit*.

If the executor lose any of the testator's chattels, he shall be responsible for their value (*o*). And in a case where the executor had lost a bond due to the testator, the Court of Chancery was inclined to charge him with the debt : but directed only that he should prosecute a suit instituted by him against the obligor, with effect, in order to recover the money on the bond, and respited judgment in the mean time (*p*). If the executor apply merely by an attorney to the obligor of a bond to pay the debt, but bring no action, he shall be charged with the amount of it (*q*). He shall in like manner, [427] be personally answerable, if, by delaying to commence an action, he has enabled a creditor of a testator to avail himself of the statute of limitations (*r*).

If an executor appoint an agent to collect the testator's effects, and the agent embezzle them, it shall be a *devastavit* by the executor (*s*). If a term be assigned by an executor in trust, to attend an inherit-

(*h*) Off. Ex. 71. 159, 160. Anon. 3 Leon. 51.

(*i*) Goring v. Goring, Yelv. 10. Norden v. Levit, 2 Lev. 189. Keilw. 52.

(*k*) Norden v. Levit, 2 Lev. 189. 2 Jon. 88. S. C. Barker v. Talcot, 1 Vern. 474.

(*l*) 3 Bac. Abr. 78. in note, et vid. 1 Vern. 474.

(*m*) Winchcombe v. Bp. of Winchester, Hob. 167. Noy, 129.

(*n*) Seaman v. Everad, 2 Lev. 40. and see Hall v. Hallet, 1 Cox's Rep. 134.

(*o*) Vid. Goodfellow v. Burchett, 2 Vern. 299.

(*p*) Ibid.

(*q*) 3 Bac. Abr. 60. Lowson v. Copeland, 2 Bro. Ch. Rep. 156.

(*r*) Hayward v. Kinsey, 12 Mod. 573. 11 Vin. Abr. 309.

(*s*) Jenkins v. Plombe, 6 Mod. 93.

ance, it shall in equity follow all the estates created out of such inheritance, and all the incumbrances subsisting upon it (*t*); but as by such assignment the term ceases to be assets at law, the executor shall be responsible to the creditors for a *devastavit* (*u*). If an executor retain money in his hands for any length of time, which by application to the Court of Chancery, or by vesting in the funds, he might have made productive, he shall be charged with interest upon it (*w*). If he permit rent to run in arrear, and it is lost through his negligence, he will be charged with the amount so lost (*x*).

If he lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency (*y*).

And where an executor sold houses and applied part of the money in payment of debts, &c. and paid the rest into his bankers, mixing it with his own money, instead of vesting the same in stock as directed by the will, and the bankers failed, he was held liable to pay the money to the legatees (*z*).

If an executor sell the testator's goods at an undervalue, although it be an appraised value (*a*); or if he delay disposing of them, by which they are injured, he is personally bound to make a compensation (*b*). If he omit to sell the goods at their full price, and afterwards they are taken out of his hands, he shall be liable to the extent of the value of the goods, and not merely to what he recovers in damages; for there was a default on his part (*c*). But if, without any imputation on him, the goods are taken out of his possession, although he recover not such damages as the goods were really worth, he shall be responsible for no more than he recovers (*d*). If the goods be perishable, and on his part there has been neither neglect in keeping them, nor delay in selling them; in case they are impaired, he shall not answer for their first value, but only for what they were worth at the time of the sale. Yet, if the goods be taken out of his possession, he must sue the party taking them, that he may exempt himself from any greater claim than the damages he shall recover (*e*).

In case of an executor's investing money in the funds, and appropriating the same, he shall not be answerable for a loss by the

(*t*) Supr. 410.

(*u*) *Charlton v. Lowe*, 3 P. Wms. 330. *Willoughby v. Willoughby*, 1 Term Rep. 763.

(*w*) 2 Fonbl. 2d edit. 184. note p. *Bird v. Lockey*, 2 Vern. 744. *Perkins v. Baynton*, 1 Bro. Ch. Rep. 375. *Littlehales v. Gascoyne*, 3 Bro. Ch. Rep. 73. *Franklin v. Frith*, 433. et vid. *ibid.* 107.

(*x*) *Tebbs v. Carpenter*, 1 Madd. Rep. 290.

(*y*) *Adye v. Feuilletau*, 1 Cox's Rep. 24.

(*z*) *Fletcher v. Walker*, 3 Madd. Rep. 73.

(*a*) Off. Ex. 158.

(*b*) *Jenkins v. Plombe*, 6 Mod. 181, 182.

(*c*) *Ibid.*

(*d*) *Jenkins v. Plombe*, 6 Mod. 181, 182.

(*e*) *Ibid.*

fall of stocks (*f*). Nor, as it seems, shall he be so liable, although, without the indemnity of a decree, he lend money on a real security, which at the time there was no reason to suspect (*g*). It has been held that trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust (*h*). But it has since been decided that an executor cannot lend money on personal security, though words which may imply a discretion so to do are used by the testator in his will (*i*). Nor will a power to lend money upon real or personal security, enable trustees to accommodate a trader with a loan upon his bond (*k*). An executor has an honest discretion to call in a debt bearing interest, if he conceive it to be in hazard (*l*). If an executor merely give a receipt [429] for so much due on a bond as he in fact receives, he shall not be charged with a *devastavit* for the residue (*m*). Nor is a conversion of the goods of the testator to his own use a *devastavit*, if he pay debts of the testator to the value with his own money (*n*). Nor is he so liable if he pay a debt of an inferior nature out of his own purse to the amount of the testator's effects in his hands; for they remain equally liable to the claim of the superior creditor, and may equally be seized at his suit in execution in specie, as the testator's property (*o*). Nor, if the executor compound an action of trover for the goods of the testator, and take a bond for the money payable at a future day, does that act necessarily amount to a *devastavit*, as the money, for which the bond is taken, is assets immediately (*p*). But he shall be charged, as we have seen (*q*), in case there be a failure in the payment of it. If there be arrears of rent on a lease, and on the tenant's becoming insolvent, the executor release the arrears, and give him a sum of money to quit possession; in case he appear thus to have acted for the benefit of the estate, he shall be allowed both (*r*). Nor is an executor, as we have seen (*s*), bound to plead the statute of limitations to an action commenced against him by a creditor of the testator.

If an executor become bankrupt, having wasted the assets, the *devastavit* may be proved under the commission (*t*). Where a specific legacy was given to an executor, who afterwards became bankrupt and committed a *devastavit*, and the subject of the speci-

(*f*) 2 Fonbl. 2d edit. 184. note p. Hutchinson v. Hammond, 3 Bro. Ch. Rep. 147. Franklin v. Frith, ib. 433. Vid. also Cooper v. Douglas, 2 Bro. Ch. Rep. 231.

(*g*) Brown v. Litton, 1 P. Wms. 141.

(*h*) Harden v. Parsons, 1 Eden's Rep. 145.

(*i*) Wilkes v. Steward, Coop. Rep. 6. and 2 Cox's Rep. 1.

(*k*) Langston v. Ollivant, Coop. Rep. 33.

(*l*) 2 Fonbl. 2d edit. 186. note q. Newton v. Bennet, 1 Bro. Ch. Rep. 361. Sed vid. Anon. Mosel. 98.

(*m*) Com. Dig. Admon. I. 2. Off. Ex. 159.

(*n*) Merchant v. Driver, 1 Saund. 307. Vid. supr. 238.

(*o*) Wheatly v. Lane, 1 Saund. 218.

(*p*) Norden v. Levit, 2 Lev. 189.

(*q*) Supra, 425.

(*r*) Blue v. Marshall, 3 P. Wms. 381.

(*s*) Vid. supr. 343.

(*t*) Whitmarsh's B. L. 2d edit. 269.

the bequest was sold by his assignees, it was held, that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the will, but that such parties were only entitled to prove under the commission to the amount of the *devastavit* (*v*).

[430] If the husband of an executrix commit a *devastavit*, in case the executorship commenced before the marriage, they shall both be chargeable. If it commenced subsequently to the marriage, the husband is liable alone. If an executrix commit a *devastavit*, and afterwards marry, the husband we have seen, as well as the wife, is responsible during the coverture (*u*).

A *devastavit* by one executor shall not charge his companion (*w*) ; (1) and if there be several executors or administrators, each shall be liable only for what he receives (*x*), (2) provided he hath not intentionally or otherwise contributed to the *devastavit* of the other (*y*). (3)

But an executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of *plenè administravit* to an action by a bond-creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond-creditor who had applied for payment of such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt (*z*).

Formerly, the executor of an executor could not be charged by a *devastavit* committed by the first executor, although to the prejudice of the king, for it was held to be a *tort* (*a*), and, therefore, to die with the party. But, by the stat. 4 & 5 W. & M. c. 24, s. 12. (4) an executor of an executor shall be liable on a *devastavit* committed by his testator, in the same manner as he would have been if living.

(*v*) *Geary v. Beaumont*, 3 Meriv. 3 Bro. Ch. Rep. 74, and vid. infr. 431.

(*x*) *Barnes*, 440.

(*u*) *Beynon v. Gollins*, 2 Bro. Ch. (y) Vid. infr.

Rep. 323. Vid. supr. 358, 359.

(*z*) *Crosse v. Smith*, 7 East, 246.

(*w*) Off. Ex. 161, 162. *Dyer*, 210. 3 (a) *Tucke's case*, 3 Leon. 241. *Bey-*
Bac. Abr. 31. *Littlehales v. Gascoyne*, non v. Gollins, 2 Bro. Ch. Rep. 324.

(1) *Sutherland v. Brush*, 7 Johns. Cha. Rep. 17.

(2) *Douglass v. Satterlee*, 11 Johns. Rep. 16. *Brown's Appeal*, 1 Dall. Rep. 311. *Moore v. Tandy*, 3 Bibb's Rep. 97.

(3) *Knox v. Pickett*, 4 Desaus. Rep. 92. *Morrell v. Morrell*, 5 Johns. Cha. Rep. 283. *Sutherland v. Brush*.

(4) The better opinion seems to be that this statute is in force in *Pennsylvania*. See *Roberts' Dig. Brit. Statutes*, 260.

CHAP. X.

OF REMEDIES FOR AND AGAINST EXECUTORS AND ADMINISTRATORS,
AT LAW AND IN EQUITY.

SECT. I.

Of remedies for executors and administrators at law.

BEFORE I conclude, it will be necessary to consider, first, what remedies, either at law or in equity, executors or administrators are entitled to, in right of the deceased ; and then, secondly, what remedies may be had against them.

In regard to the first of these points, the subject has been in a great measure anticipated by the discussion of the executor's interest in the testator's *choses in action* (a), the existence of which necessarily supposes a remedy to give it effect.

From what has been already stated it appears, that the executor represents the testator in respect to all his personal contracts : therefore he may maintain such actions to enforce them as might have been maintained by the testator himself (b). Thus an executor [432] may have an action on a debt due to the testator by judgment, statute, recognizance, obligation, or other specialty (c). So he is entitled to an action of debt suggesting a *devastavit* in the lifetime of his testator, on a judgment recovered by such testator against an executor (d). So the executor of the assignee of a bail-bond shall have an action upon it (e). So an executor may maintain an action on a bond, though conditioned for the performance of an award (f). He may also have an action on a covenant entered into with the testator to perform a personal thing (g) ; and even on a covenant that touches the realty, as for assuring lands, if it were broken in the testator's lifetime ; and in such cases damages shall be recover-

(a) Vid. *supr.* 157.

(b) 3 Bac. Abr. 59, 91. Countess of Rutland v. Rutland, Cro. Eliz. 377. Latch. 167. Roll. Abr. 912. Off. Ex. 65.

(c) Com. Dig. Admon. B. 13.

(d) Berwick v. Andrews, 1 Salk. 314.

Mod. Ca. 126. S. C. Ld. Raym. 971. 1502. Vid. Erving v. Peters, 3 Term Rep. 685.

(e) Fort. 367.

(f) 2 Ventr. 349.

(g) Latch. 168.

ed by the executor, although he be not expressly named (*h*); (1) for since the testator was entitled to an action of covenant for such breach and to recover damages as the principal remedy, and not merely accessory, the law devolves such remedy on the executor: but if waste be committed by the lessee in the lifetime of the lessor, after his death his heir can have no action for the waste, because he cannot recover treble damages; nor can the executor have it, for he [433] has no right to recover the place wasted, the inheritance of which has descended to the heir (*i*).

The executor may also, in the right of the testator, maintain an action on simple contracts, in writing, or not in writing, either express or implied (*k*); and even on contracts for the benefit of a third person (*l*). He may likewise have an action for a relief due to the testator (*m*). And pursuant to the stat. 13 *Ed. 1. West. 2. c.* 23. (2) an executor is entitled to an action of account on account with his testator (*n*); but this species of remedy in the courts of law has fallen into disuse. He may also, by the express provision of the stat. 4 *Ed. 3. c. 7.*, (3) have an action of trespass for the taking of the testator's goods: and although the statute speak only of the carrying away of goods, yet its operation is not confined to that specific trespass, which is named merely for an example; but it has been held, as we have seen (*o*), to comprehend other injuries to the testator's personal estate (*p*): therefore on this statute, an action will lie for trespass with cattle on his leasehold premises (*q*): or for cutting corn, though growing on his freehold lands, and carrying it away at the same time (*r*). So by the like equity of this statute [434] an executor may maintain an action of trover for the conversion of the testator's goods in his lifetime (*s*); (4) or an action

(*h*) Com. Dig. Admon. B. 13. Covenant, B. 1. 3 Bac. Abr. 91. *Lucy v. Lexington*, 2 Lev. 26. S. C. Ventr. 175. Off. Ex. 65.

(*i*) Off. Ex. 65. Com. Dig. Wast. C. 3. 2 Inst. 305.

(*k*) Com. Dig. Admon. B. 13. 3 Bac. Abr. 59. 92. *Petrie v. Hannay*, 3 Term Rep. 660.

(*l*) Al. 1.

(*m*) Nov. 43. Id. *St. John v. Brandring*, Cro. Eliz. 883.

(*n*) Com. Dig. Admon. B. 13.

(*o*) Supr. 158.

(*p*) Com. Dig. Admon. B. 13. Semb. Latch. 168.

(*q*) Off. Ex. 67, 68.

(*r*) *Emerson v. Emerson*, 1 Ventr. 187.

(*s*) *Harris v. Vandridge*, Moore, 400. *Countess of Rutland v. Rutland*, Cro. Eliz. 377. Latch. 168. 1 Anders. 242. *Russell's case*, 1 Leon. 193, 194. *Morceron's case*, 1 Ventr. 30.

(1) *Walson, Adm. v. Blane, Ex.* 12 Serg. & Rawle, 131.

(2) In force in *Pennsylvania*, 3 Binn. 604. *Roberts' Dig.* 14.

(3) In force in *Pennsylvania*, 3 Binn. 610. *Roberts' Dig.* 248.

(4) See 2 Johns. Rep. 229. *Kirby v. Clark*, 1 Root, 389. *Towle v. Lovett*, 6 Mass. Rep. 394. And the statute of limitations is no bar in an action of trover, where the conversion of the property of a deceased person was before letters of administration were granted to the plaintiff, but at a time when there was no person to assert the rights of the creditors and legatees of the deceased—the statute begins to operate only from the time a right to demand the property vests in some one. *Huselt's Adm. v. Glenn*, 7 Harr. & Johns. Rep. 17. *Fishwick's Thru. v. Swell*, 4 Harr. & Johns. 393.

of debt on the stat. 2 & 3 *Ed.* 6. *c.* 13. for not setting out tithes due to the testator (*t*) ; or a *quare impedit*, in case he died within six months after the usurpation (*u*) ; and, it seems, that under this statute an executor may maintain ejectment for an *ouster* of the testator, although he were seized in fee, because in such case the executor may proceed in that form of action for damages only (*w*), in the same manner as a lessee where the lease expires pending the suit (*x*).

By the common law an executor is entitled to an action of replevin for goods distrained in the testator's lifetime (*y*) ; or to an action of detinue for any specific chattel ; or to bring ejectment to recover land held for a term of years ; for in those instances the thing itself is the object of the action, and the property continues in the plaintiff (*z*).

[435] He may likewise avow for rent in arrear at the testator's death, as incident to a reversion for years, which devolved upon him as executor (*a*).

An executor shall also have an action against a sheriff for the escape of a party in execution on a judgment obtained by the testator, even where the escape happened in the testator's lifetime (*b*). (1) So he may have an action against the sheriff for not returning his writ, and paying money levied on a *fieri facias* (*c*), (2) or for a false return, stating that he had not levied the debt, when in truth he had (*d*). So the executor of a landlord may maintain an action against an officer for removing goods taken in execution before the payment of a year's rent (*e*). So in the character of an executor he may have a writ of error (*f*). And it has been held, that he may

(*t*) *Holl v. Bradford*, 1 Sid. 88. *Morton v. Hopkins*, 407. *Williams v. Cary*, 4 Mod. 404. *Eaves v. Mocato*, 1 Salk. 314. *Moreton's case*, 1 Ventr. 30. 3 Bac. Abr. 91, in note.

(*u*) Off. Ex. 66, 67. Sav. 94. Latch. 168. Noy. 87. Poph. 189. 4 Leon. 15.

(*w*) 3 Bac. Abr. 92. *Moreton's case*, 1 Ventr. 30. *Doe v. Potter*, 3 Term Rep. 13.

(*x*) *Doe v. Potter*, 3 Term Rep. 16. *argdo.* Co. Litt. 285. Stra. 1056.

(*y*) *Arundell v. Trevill*, 1 Sid. 82. Latch. 168. Off. Ex. 66. *Gilb. L. of Distr.* 3d edit. 156.

(*z*) Latch. 168. Off. Ex. 65.

(*a*) Com. Dig. Distress, A. 2. 1 Roll. Abr. 672. *Wankford v. Wankford*, 1 Salk. 302. 307. *Duncombe v. Walter*, 2 Show. 254.

(*b*) Com. Dig. Admon. B. 13. *Spurstow v. Prince*, Cro. Car. 297. *Dyer*, 322. Vid. *Berwick v. Andrews*, 1d. Raym. 973.

(*c*) 1 Roll. Abr. 913. *Spurstow v. Prince*, Cro. Car. 297.

(*d*) *Williams v. Cary*, 4 Mod. 404. S. C. 1 Salk. 12. Comb. S. C. 322, 323. S. C. 1 Ld. Raym. 40. 3 Bac. Abr. 98.

(*e*) *Palgrave v. Windham*, Stra. 202.

(*f*) Latch. 167.

(1) The executors of a sheriff cannot maintain, it seems, a special action on the case against a gaoler or deputy sheriff, for a voluntary escape, the gaoler being responsible only in *assumpsit* on his implied undertaking to serve the sheriff with fidelity. *Kain, Ex. v. Ostrander*, 3 Johns. Rep. 159.

(2) *Paine v. Ulmer*, 7 Mass. Rep. 317.

have such writ to reverse the testator's attainder of high treason, inasmuch as the executor is privy to the judgment, and may be damnified by it; but, on the other hand, it has been insisted, that though the reversal restore the blood and land, it is of no avail to the executor, since the goods are forfeited by the conviction, and not by [436] the attainder (*g*). An executor is likewise entitled to remedies by action of deceit, by *audita querela*, or *identitate nominis* (*h*).

He may also sue in that character in a court of conscience (*i*).

And by the stat. 11 *Geo. 2. c. 19. s. 15.* (1) above referred to (*h*), an executor of tenant for life, on whose death any lease determined, shall in an action on the case recover of the lessee a just proportion of rent from the last day of payment to the death of such lessor.

But an executor has no right to an action for an injury to the person of the testator; (2) as for a battery, (3) imprisonment, or the like (*l*): nor for a breach of promise of marriage, where no special damage is alleged (*m*): (4) nor for a prejudice to his freehold; as for felling his wood, or cutting and carrying away his grass; for wood and grass growing are parcel of the freehold (*n*), and consequently in such case the heir, and not the executor, is the party injured. Yet, if the lord of a manor assess a fine on a copyholder for his admittance, and die, his executor may bring an action for it; for it does not depend on the inheritance, but is like a fruit fallen (*o*).

[437] The executor may also in right of the testator maintain actions, the cause of which accrued after the testator's death (*p*); as in case a bond given to the testator be forfeited after that event (*q*); or a personal covenant entered into with the testator be broken (*r*); or a debt on any other species of contract made with him become

(*g*) *King v. Ayloff*, 2 Salk. 295. pl. Off. Ex. 67, 68.

1. Vid. 4 Bl. Com. 387.

(*h*) Latch. 167. Off. Ex. 71. 3 Bac. Abr. 60.

(*i*) Dougl. 246.

(*k*) Supr. 208.

(*l*) Com. Dig. Admon. B. 18. Latch. 168, 169. 1 Anders. 243. Le Mason v. Dixon, Jon. 174.

(*m*) Chamberlain v. Williamson, 2 Mau. & Sel. 408.

(*n*) Emerson v. Emerson, 1 Ventr. 187. Le Mason v. Dixon, Jon. 174.

(*o*) 3 Bac. Abr. 92. Le Mason v. Dixon, Carth. 90. Shuttleworth v. Garnet, 3 Mod. 239. S. C. 3 Lev. 261. S. C. Comb. 151. S. C. Show. 35. Evelyn v. Chichester, 3 Burr. 1717. accord.

(*p*) Com. Dig. Pleader, 2 D. 1. Anon. 3 Leon. 212.

(*q*) 3 Bac. Abr. 93. 1 Roll. Abr. 602.

(*r*) Off. Ex. 82. 11 Vin. Abr. 231. L. of Ni. Pri. 158.

(1) The 14th and 15th sections of this statute are in force in *Pennsylvania*. 3 Binn. 626. *Roberts' Dig.* 236.

(2) "Suppose the case of a physician or surgeon, who by unskilful treatment injures the health of a patient—it will hardly be contended, that in case of death, the cause of action would survive." *Per Tilghman*, C. J. 13 Serg. & Rawle, 185.

(3) *Miller v. Umbehouer*, 10 Serg. & Rawle, 31.

(4) *Lattimore v. Rogers*, 13 Serg. & Rawle, 183.

payable (*s*); or his goods be taken (*t*); (1) or trespass committed on his leasehold premises (*u*); (2) in all these, and the like instances, the executor, in his representative capacity, is entitled to a remedy by action.

So, if the testator died possessed of a term for years in an advowson, it vests, as we have seen (*w*), in his executor; and therefore, in case of his being disturbed, he may maintain a *quare impedit* (*x*). So an executor may have an action of replevin for goods taken after the death of the testator (*y*). An executor may also avow for rent accrued due after that time, as incident to a reversion for years, which vested in him in that character (*z*).

[438] If a defendant in execution on a judgment recovered by the testator, escape after the testator's death, the executor shall have an action against the sheriff for the escape (*a*); as he shall also in case the defendant were in execution on a judgment recovered by him as executor (*b*). (3)

So a bail-bond may be assigned to the executor of a deceased plaintiff, and he may bring an action upon it (*c*): or a bill of exchange may be endorsed to A. as executor, and he may in that character maintain an action on the bill against the acceptor (*d*). (4) And in like manner an executor may bring an action on any other contract made with him in his representative capacity (*e*). (5)

An executor may hold to bail on an affidavit of his belief of the existence of the debt, for the nature of his situation will not admit of his being more positive (*f*). Therefore, if an executor swear

(*s*) King v. Stevenson, 1 Term Rep. 487. Munt v. Stokes, 4 Term Rep. 565. Com. Dig. Pleader, 2 D. 1. 3 Bac. Abr. 94. Reg. 140. 5 Co. 31 b. Smith v. Norfolk, Cro. Car. 225. Frevin v. Paynton, 1 Lev. 250.

(*t*) 4 Bac. Abr. 93. in note 94. 1 Roll. Abr. 602. Lane, 80. Jenkins v. Plombe, 6 Mod. 92.

(*u*) Com. Dig. Admon. B. 13. Off. Ex. 70.

(*w*) Vid. supr. 139.

(*x*) Off. Ex. 36.

(*y*) Ibid.

(*z*) Com. Dig. Admon. B. 9. Wankford v. Wankford, 1 Salk. 302. 307.

11 Vin. Abr. 204. Duncomb v. Walter, 2 Show. 254. Vid. supr. 434.

(*a*) 3 Bac. Abr. 57. Off. Ex. 46. Godb. 262. Vid. supr. 435.

(*b*) Slingsby v. Lambert, 1 Roll. Rep. 276. Wate v. Briggs, 1 Lord Raym. 35. Bonafous v. Walker, 2 Term Rep. 128.

(*c*) Fortes. 370.

(*d*) King v. Stevenson, 1 Term Rep. 487.

(*e*) Com. Dig. Pleader, 2 D. 1. Cro. Car. 685. Roll. Abr. 602. 3 Bac. Abr. 93.

(*f*) Mackenzie v. Mackenzie, 1 Term Rep. 716. 3 Bac. Abr. 101.

(1) *Carlisle v. Burley*, 3 Greenl. Rep. 250.

(2) An administrator may maintain *trespass* for an injury to personal property committed after the death of the intestate, and *before* administration granted. *Hutchins v. Adams*, 3 Greenl. Rep. 174.

(3) After a judgment recovered in a suit by an administrator, the debt is due to the plaintiff in his personal capacity, and in action of debt upon it he may declare that the debt is due to himself. *Biddle v. Wilkins*, 1 Peters' S. C. Rep. 686.

(4) So he may sue in his own name, or as executor, upon a note made payable to a third person or *bearer*, and transferred to his testator *before* his death. *Brooks v. Floyd*, 2 McCord's Rep. 364.

(5) *Ayres v. Toland*, 7 Harr. & Johns. Rep. 2.

to the books of the testator, and that he believes them to contain a true account, and the debt to be still unpaid, it shall be sufficient (*g*). But an affidavit by an executor, that the defendant was indebted to his testator in fifty pounds as appears by the testator's books, was held defective, and common bail ordered (*h*). And so was an affidavit by an executor of a debt due to his testator, "as appears from a statement made from the testator's books, by an accountant employed by the deponent (*i*)."

[439] It is a general rule, that an executor, when plaintiff, shall pay no costs, either on a nonsuit or verdict, for he sues in *auter droit*, and the law does not presume him to be sufficiently cognisant of the nature and foundation of the claims he has to assert (*k*). Therefore, if an executor bring an action of trover on a conversion in the testator's lifetime, he shall not be liable to costs (*l*). Nor shall he be liable if the trover were in the testator's lifetime and the conversion after his death (*m*). Nor shall he pay costs in an action for a debt due to the testator in his lifetime (*n*). Nor in an action for a debt due on a contract made with the testator, which became payable after his death (*o*). Nor shall an executor be subject to costs on a writ of error on a judgment recovered against the testator (*p*); for, in all these instances, it is necessary for him to sue in his representative character, and expressly to name himself executor. But if he reside abroad and commence an action, the court will require him to give security for costs, although he sue in the capacity of executor (*q*). Where a plaintiff sued as executor and was nonsuited, upon evidence given at the trial that the supposed testator was still alive: the Court of King's Bench refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not (*r*). But if he may bring the action in his private capacity, there, if he fail, he shall be liable to costs; as in an action for trover and conversion subsequent to the testator's death (*s*): [440] Or if he bring an action for money belonging to the testator's

(*g*) 1 Crompt. Prac. 40.

(*h*) 1 Crompt. Prac. 40. Walrond v. Fransham, Stra. 1219.

(*i*) Rowney v. Dean, 1 Price Rep. 402.

(*k*) 2 Bac. Abr. 46. 3 Bac. Abr. 100. Cro. Jac. 228. Anon. Yelv. 168. 1 Roll. Rep. 63. Gale v. Till, Carth. 281. S. C. 4 Mod. 244. S. C. 3 Lev. 375. Skin. 400. Portman v. Cane, Stra. 682. 3 Bl. Com. 400. Tidd's Practice, B. R. 894. Fetherston v. Allybon, Cro. Eliz. 503. 2 Bulst. 261. Jenkins v. Plumbe, 1 Salk. 207. Eaves v. Mocato, ib. 314. Hawes v. Saunders, 3 Burr. 1586. Say. Costs. 97.

(*l*) Cockerill v. Kynaston, 4 Term Rep. 277.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Anon. 1 Ventr. 92. 1 H. Bl. 528. Portman v. Cane, 2 Ld. Raym. 1413. S. C. Stra. 682. Vid. Cockerill v. Kynaston, 4 Term Rep. 278.

(*p*) Gale v. Till, 3 Lev. 375. Vid. Cockerill v. Kynaston, 4 Term Rep. 280.

(*q*) Chevalier v. Finnis, 3 Moore's Rep. 602.

(*r*) Zachariah v. Page, 1 Barn. and Ald. 386.

(*s*) 3 Bac. Abr. 100. Savil. 134. Latch. 220. Anon. 1 Ventr. 92. Hutt. 78. Salk. 3, 4. Bollard v. Spencer, 7 Term Rep. 358. Vid. Cockerill v. Kynaston, 4 Term Rep. 279. Hollis v. Smith, 10 East. 295.

estate, had and received by the defendant after the death of the testator (*t*): Or if he bring an action on a bond executed to him by the defendant, for securing a debt due to the testator by simple contract (*u*): Or if he fail by his own misleading (*w*): Or if he bring a writ of error where he was liable to costs in the original action (*x*): (1) In all these cases the cause of action accrues to him personally; and, therefore, like every other plaintiff, he shall be subject to costs. Nor shall he be exempt by naming himself executor in an action, when there is no necessity to do so: otherwise he may in all cases indiscriminately evade the payment of costs (*y*). If in an action at the suit of the executor, the defendant pay money into court, the effect of it will not be to make the plaintiff liable to pay, but only to lose his costs, in case he proceed, and fail to recover a farther sum (*z*).

An executor is subject to costs on a judgment of *non pros* (*a*). (2) And where he has *knowingly* brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs on a discontinuance (*b*): or for not proceeding to trial according to notice (*c*); (3) but generally he is not liable to costs in either of those two [441] cases (*d*). (4) Nor where he sues merely in *auter droit* is he subject to costs on a judgment, as in case of a nonsuit (*e*).

Nor is it necessary for the executor or administrator of an attorney to deliver a bill of costs for business done by the deceased before the commencement of an action: for the stat. 2 Geo. 2. c. 23. § 23. is confined to actions brought by the attorney himself, and extends not to his personal representative (*f*). And the Court of

(*t*) Goldthwayte v. Petrie, 5 Term Rep. 234. Vid. also Smith v. Barrow, 2 Term Rep. 477.

(*u*) Vid. Cockerill v. Kynaston, 4 Term Rep. 280.

(*w*) Higgs v. Warry, 6 Term Rep. 654.

(*x*) 1 H. Bl. Rep. 566.

(*y*) 3 Bac. Abr. 100. Jones v. Wilson, 11 Mod. 256. Vid. Cockerill v. Kynaston, 4 Term Rep. 280.

(*z*) 3 Bac. Abr. 100. Gregg's case, 2 Salk. 596. Cruchfield v. Scott, 2 Stra. 796.

(*a*) Tidd's Prac. B. R. 379, 380, 895. Ca. Pr. C. B. 14, 157, 158. Hawes v.

Saunders, 3 Burr. 1584. Higgs v. Warry, 6 Term Rep. 654.

(*b*) Tidd's Prac. B. R. 606, 607, 895. Ca. Pr. C. B. 79. Harris v. Jones, 3 Burr. 1451. S. C. 1 Bl. Rep. 451.

(*c*) Ca. Prac. C. B. 158. Hawes v. Saunders, 3 Burr. 1585. 1 H. Bl. 217.

(*d*) Baynham v. Matthews, 2 Stra. 871. Barnes, 133. Bennet v. Coker, 4 Burr. 1927. Say. Costs. 96, 97.

(*e*) Tidd's Prac. B. R. 694. Bennet v. Coker, 4 Burr. 1928. Barnes, 130. Booth v. Holt, 2 H. Bl. 277.

(*f*) Tidd's Prac. B. R. 919. 1 Barnard. K. B. 433. Andr. 276. Ca. Prac. C. B. 58.

(1) An executor or administrator is liable for costs in error only in cases where he would be subject to costs in the court below. *Gleason v. Clark*, *Adm.* 1 Wend. Rep. 303.

(2) *Rudd et al. Ex. v. Long*, 4 Johns. Rep. 190, 2d edit.; and the reporter's note. *Contra*, *Frink v. Luyten*, *Vanderost's Ex. v. Whitner*, 2 Bay, 166, 399.

(3) *Per Curiam*, 2 Bay, 400. *Brown, Ex. v. Lambert*, 15 Johns. Rep. 148. So also in the case of a *scire facias* to revive a judgment obtained by the testator, an executor is liable to the costs of a *non pros* for not proceeding to trial. *Hogeborn, Ex. v. Clark*, 17 Johns. Rep. 268. So also the costs of an unsupported action. *Hardy v. Call*, 16 Mass. Rep. 530.

(4) *Musser, Adm. v. Good*, 11 Serg. & Rawle, 247.

Common Pleas will not suffer such a bill to be taxed (*g*). But in the Court of King's Bench the practice is different; for there the bill may be referred to be taxed, on the defendant's undertaking to pay what is due (*h*). Yet where an attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off; on motion that the executrix may pay the costs, the court held her not to be liable, since the act imposes them on the attorney or solicitor only, and an executor is not to blame if he stand on the testator's bill, or make out one from his books (*i*).

Where the plaintiff dies after final judgment, and before execution, his executor or administrator shall sue execution by *scire facias* (*k*). (1) If after a *fieri facias* sued out the plaintiff die, the sheriff deriving his authority from the writ may levy the money, and may pay it to the executor; or in case the plaintiff died intestate, it shall be brought into court, and remain there until administration be committed, when the administrator, on producing the grant, shall receive it (*l*). So if under a *fieri facias* the goods are seized, and the plaintiff die before sale, and then the goods are sold, the executor or administrator shall have the money; nor shall it be a sufficient return to state that the plaintiff is dead, for that is no abatement of the writ (*m*). (2)

At common law the death of the plaintiff at any time before final judgment abated the suit; but by stat. 17 *Car. 2. c. 8.* (3) if either party die between verdict and judgment, his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict (*n*). In the construction of this statute it has been holden, that the party's death before the assizes is not remedied; but if he die after the assizes are commenced, although before the trial, that [443] case is within the act, for being remedial it shall be construed liberally (*o*). The judgment on this statute is entered as if the

(*g*) Tidd's Prac. B. R. 919. Barnes, 119. 122.

Nov. 73. Dyer, 76 b. Tidd's Prac. B. R. 932, 933.

(*h*) Tidd's Prac. B. R. 919. Gregg's case, 1 Salk. 89. Weston v. Poole, 2 Stra. 1056. Say. Costs. 324, 325. Inq. K. B. 482.

(*m*) Clerk v. Withers, 6 Mod. 297. Cleve v. Vere, Cro. Car. 459. Harrison v. Bowden, 1 Sid. 29. 2 Lord Raym. 1073.

(*i*) Tidd's Prac. B. R. 919. Wilson v. Poole, 2 Stra. 1056. Say. Costs. 327.

(*n*) Tidd's Prac. B. R. 842. 1052, 1053.

(*k*) Com. Dig. Execution, E. 2 Inst. 295. See Tidd's Prac. B. R. 1056.

(*o*) Tidd's Prac. B. R. 842. Anon. 1 Salk. 8. & vid. 2 Ld. Raym. 1415. in note. Jacobs v. Miniconi, 7 Term Rep. 31.

(*l*) Clerk v. Withers, 6 Mod. 297.

(1) In *Pennsylvania*, on the death of the plaintiff after judgment, and the suggestion thereof on the record, his executor or administrator may issue execution without *scire facias*. *Deiser, Adm. v. Sterling*, 10 Serg. & Rawle, 119.

(2) In *Pennsylvania* it is the universal practice to issue a *renditioni exponas* after execution levied on land, though both parties, plaintiff and defendants, are dead, without calling in their representatives. *Krider v. Deklyne*, Sup. Court, Dec. Term, 1824, stated 13 Serg. & Rawle, 147.

(3) In force in *Pennsylvania*, 3 Binn. 624. *Roberts' Dig.* 39.

party were alive (*o*), and it must be entered, or at least signed (*p*), within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out (*q*); and such *scire facias*, pursuing the form of the judgment, should be general, as on a judgment recovered by or against the party himself (*r*).

By a subsequent statute (*s*) if the plaintiff die after interlocutory, and before the final judgment, the action shall not abate, if such action might originally have been sued by his executor or administrator; but the executor or administrator may have a *scire facias* against the defendant; or, if he die after such interlocutory judgment, against his executor or administrator. And if the defendant, his executor or administrator, appear, and shew no cause to arrest the final judgment, or on a *scire facias* or two *nihils*, make default, a writ of inquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor or administrator. This statute has been held not to extend to cases where the party dies before interlocutory judgment, although it be after the expiration of the rule to plead (*t*).

Where either party dies after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* on this statute [444] ought to be for the defendant, or his executor or administrator, to shew cause why the damages should not be *assessed*, and recovered against him (*u*), and to hear the judgment of the court thereupon (*w*). But where the death happens after the writ of inquiry is executed, and before the return, the *scire facias* must be to shew cause why the damages assessed by the jury should not be adjudged to the plaintiff or his executor or administrator (*x*).

The judgment on this statute is not entered for or against the party himself, as on the stat. 17 *Car.* 2., but for or against his executor or administrator (*y*). And where the defendant dies after interlocutory and before final judgment, two writs of *scire facias* must be sued out, before he can have an execution; one before the final judgment is signed, in order to make the executor or administrator a party to the record: the other after final judgment is signed, in order to give him an opportunity of pleading no assets, or any other matter of defence; for it were unreasonable that the situation of the executor or administrator should be worse, where the party deceased died before the final judgment was signed, than it would have been if his death had been subsequent (*z*).

(*o*) *Weston v. James*, Salk. 42.

(*p*) 1 Sid. 385. *Barnes*, 261.

(*q*) *Earl v. Brown*, 1 Wils. 302.

(*r*) *Colebeck v. Peck*, 2 Ld. Raym. 1280.

(*s*) Stat. 8 & 9 W. 3. c. 11. s. 6. Vid. Com. Dig. Admon. (G.) and *Hollingshead's case*, 1 P. Wms. 744.

(*t*) *Tidd's Prac. B. R.* 1055. *Wallop*

v. Irwin, 1 Wils. 315.

(*u*) *Lil. Entr.* 647.

(*w*) *Smith v. Harman*, 6 Mod. 144.

(*x*) *Goldsworthy v. Southcote*, 1 Wils. 243. & vid. *Executors of Wright v. Nutt*, 1 Term Rep. 388.

(*y*) *Weston v. James*, 1 Salk. 42.

(*z*) *Say. Rep.* 266.

Whether an executor of a deceased partner must or can join [445] with the survivor in an action for goods carried away, or money had and received in the testator's lifetime, I have already stated to have been a matter of some doubt; but it seems now settled that the latter must sue alone, as the remedy survives, although there be no survivorship of the duty (*a*).

Before the stat. 31 *Geo. 3. c. 87.* an infant of the age of seventeen was capable of taking out probate, and therefore of maintaining an action as executor; but, during his minority, he was obliged to sue by guardian, or *prochein amy*; and could not sue by attorney.

But as, by this statute, probate shall not be granted to him till he shall have attained the full age of twenty-one years; he cannot in his representative capacity sustain an action before that period.

If a married woman be executrix, the husband cannot sue in right of the testator without the wife (*b*).

An executor named during the minority of another, has the same right to bring actions as an absolute executor (*c*).

[446] As executors, in their representation of the testator, make but one person, they must all join in the bringing of actions in his right (*d*); (1) although some have omitted to prove the will, or have even refused before the ordinary (*e*).

If an infant be co-executor with other persons of full age, he must, I apprehend, join with them in an action, and they shall all together sue by attorney; for such was the law before the statute with regard to an infant under the age of seventeen (*f*).

If A. and B. be appointed executors, and A. refuse to join in such action, B. may commence the action in the names of them both; and then, on summoning A., there shall be judgment of severance; that is to say, that B. shall sue alone; or on A.'s default on the summons, there shall be the same judgment; and B. then may proceed in the action, and recover in his own name only: otherwise, a co-executor by collusion with the debtor might prevent his being sued for the debt (*g*). (2) By the death of the party severed, the

(*a*) Supr. 155, 156, 163.

(*b*) Com. Dig. Admon. D. Off. Ex. 207, 208.

(*c*) Com. Dig. Admon. F. Semb. Off. Ex. 215, 216.

(*d*) 3 Bac. Abr. 32. Off. Ex. 42, 95. 100. Godolph. 134.

(*e*) Off. Ex. 42. Com. Dig. Abatement. E. 13. Pleader, 2 D. 1. 9 Co. 57. Swallow v. Emberson, 1 Lev. 161.

Vid. supr. 41, 45.

(*f*) 3 Bac. Abr. 618. 1 Roll. Abr. 288. Cro. Eliz. 278. 2 Saund. Fox-wist v. Tremaine, 212, 213. S. C. 1 Vent. 102. S. C. 1 Sid. 449. Coan v. Bowles, Carth. 124.

(*g*) 3 Bac. Abr. 33. Price v. Packhurst, Cro. Car. 420. 2 Roll. Abr. 98. Off. Ex. 98, 99.

(1) And one administrator cannot sue his co-administrator, on a bond executed by the latter to the intestate; nor will it enable him to sue if he assign the bond to a creditor of the intestate, and obtain from him a reassignment to himself. *Simon, Adm. v. Albright*, 12 Serg. & Rawle, 429.

(2) If one of two co-executors direct an appeal, writ of error, or supersedeas,

writ shall not abate (*h*). Nor, if he live till judgment, can he sue out execution, because the recovery is in the name of the other executor alone (*i*).

[447] If a judgment be recovered by two executors, and the one prays a *capias*, and the other a *feri facias*; it has been said the *capias* shall be awarded as most beneficial for the estate (*k*).

By the stat. 25 E. 3. c. 5. (1) the executor of an executor is put on the same footing; in regard to the bringing of actions, as an immediate executor (*l*).

An executor *deson tort* is not entitled to bring any action in right of the deceased. As he comes in by wrong, he is liable to all the trouble of an executorship, without any of its privileges (*m*). (2)

An administrator may, in right of his intestate, maintain actions in the same manner as an executor in right of his testator (*n*).

All special and limited administrators likewise may maintain actions in right of their respective intestates. And, indeed, the principle on which the ordinary has the power of granting such administrations, is, that there may be a person capable of recovering property belonging to the estate (*o*).

[448] If an administrator *durante minoritate* bring an action and recover, and then his administration determine by the executor's coming of age, such executor may have a *scire facias* on the judgment (*p*).

So if such administrator obtain judgment, he may bring a *scire facias* against the bail, nor can they object that the executor has attained the age of twenty-one years; for the recognizance is to the administrator himself by name (*q*). But it seems to be a question whether in such case he or the executor shall sue out execution on the judgment (*r*).

If there be several administrators, they must, like co-executors, all join in an action (*s*).

(*h*) Anon. Cro. Eliz. 652. Co. Litt. 139.

(*i*) Off. Ex. 105, 106.

(*k*) 3 Bac. Abr. 33. in note. Foster v. Jackson, Hob. 61. Vid. Hudson v. Hudson, 1 Atk. 460.

(*l*) Vid. Off. Ex. 257. Godb. 262.

(*m*) 2 Bl. Com. 507. Walker v. Woolaston, 2 P. Wms. 583. vid. sup. 366.

(*n*) Com. Dig. Admon. B. 13. Off. Ex. 259.

(*o*) Walker v. Woolaston, 2 P. Wms. 576. 6 Co. 67 b.

(*p*) 3 Bac. Abr. 18. 1 Roll. Abr. 888, 889. Cro. Car. 127. Hatton v. Mascal, 1 Lev. 181. Coke v. Hodges, 1 Vern. 25.

(*q*) 3 Bac. Abr. 18. Eubrin v. Manponson, 2 Lev. 37.

(*r*) Ib. 2 Lev. 37.

(*s*) Com. Dig. Abatement, E. 14. Pleader, 2 D. 10.

originally granted to them both, to be dismissed, the other may proceed without him; and since both are before the court, an *order of severance* may be made without a summons.

(1) In force in *Pennsylvania*. 3 Binn. 611. *Roberts'* Dig. 249.

(2) *Lee v. Wright*, 1 Rawle, 151. Nor can he be cited to account before the Register. *Peebles' Appeal*, 15 Serg. & Rawle, 41.

An administrator *de bonis non*, claiming by title paramount, could not at common law have a *scire facias*, or otherwise proceed on a judgment recovered by an executor, or administrator (*t*). (1) But now if a judgment after verdict be recovered by an executor or administrator, in such case an administrator *de bonis non* is by stat. 17 Car. 2. c. 8. (2) entitled to sue a *scire facias*, and take out execution on such judgment. (3) If the executor or administrator die after suing out the writ of execution and before the return of it, the administrator *de bonis non* is, by the equity of that act, permitted to perfect the execution thus commenced, for the right is devolved upon him (*u*). (4) And in such case, if the sheriff return a seizure of goods to the value, but that they remain in his hands *pro defectu emptorem*, the administrator *de bonis non* may sue out a *venditioni exponas*, or *distringas nuper vice comitem* (*w*). If at the time of the executor's or administrator's death the money be levied, it shall be brought into court, and the administrator *de bonis non*, on producing the letters of administration, shall be entitled to receive it (*x*). But if an executor bring a *scire facias* on a judgment, or recognizance, and get judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* on the final judgment, and cannot proceed in the judgment on the *scire facias* (*y*). The statute extends only to judgments after verdict (*z*). On any other judgment obtained by the executor or administrator, the administrator *de bonis non* shall not have a *scire facias* for want of privity, but must resort to his remedy at common law, by an action of debt *de novo* for the same demand, as administrator to the first testator or intestate (*a*). Yet even on a judgment by default, if the executor or administrator sue out execution and die when the goods are in the hands of the sheriff, and consequently the writ is completely executed, the administrator *de*

(*t*) Com. Dig. Admon. G. Levet v. Lewkenor, Moore, 4. Yate v. Goth, ib. 680. Cro. Jac. 4. 1 Roll. Abr. 890. Norgate v. Snape, Wm. Jones, 214. Snape v. Norgate, Cro. Car. 167. Tidd's Prac. B. R. 1057.

(*u*) Com. Dig. Admon. G. Clerk v. Withers, 1 Salk. 322. S. C. 6 Mod. 290. S. C. 2 Ld. Raym. 1072. Vid. 1 Sid. 29.

(*w*) Clerk v. Withers, 1 Salk. 323. S. C. 6 Mod. 295, 297, 298, 299. S. C.

2 Ld. Raym. 1074.

(*x*) Ibid. 6 Mod. 299, 300. ib. 2 Ld. Raym. 1074, 1076.

(*y*) Tidd's Prac. B. R. 1058. Trevisan v. Lawrence, 2 Ld. Raym. 1049.

(*z*) Clerk v. Withers, 6 Mod. 296, 297.

(*a*) See Com. Dig. Admon. G. Levet v. Lewkenor, Moore, 4. Yaites v. Gough, 680. Cro. Jac. 4. Yaites v. Gough, Yelv. 33. 5 Co. 9 b.

(1) *Grout, Adm. v. Chamberlin*, 4 Mass Rep. 611. *acc.*

(2) In force in *Pennsylvania*. 3 Binn. 624. *Roberts' Dig.* 369. See also *Dale v. Roosevelt*, 8 Cow. Rep. 333. *Dykes v. Woodhouse's Adm.* 3 Rand. Rep. 287.

(3) Or maintain an action of debt upon it. *Dykes v. Woodhouse's Adm.* 3 Rand. Rep. 287.

(4) So he may have a writ of error on a judgment against a previous executor or administrator. *Dale v. Roosevelt*, 8 Cow. Rep. 333.

bonis non shall have the money brought into court, and on shewing the grant it shall be paid over to him (*b*). Or if the judgment by default be for goods taken out of the executor's or administrator's own possession, his executor or administrator shall have a *scire facias* upon it, and account for them to the administrator *de bonis non* (*c*). (1)

In case a party died seised of a rent-service, rent-charge, rent-seck, or fee-farm, in fee-simple, fee-tail, or *per auter vie* in the lifetime of *cestui que vie*, the common law afforded no remedy to recover the arrears due at the time when the owner of such rents died. It was therefore enacted by the stat. 32 H. 8. c. 37. (*d*), that the executors and administrators of tenants in fee, fee-tail, or for life, of such rents, may have an action of debt for all such arrears, or may distrain for the same upon the lands chargeable, so long as they remain in the possession of the tenant who ought to have paid the rents; or of any other person claiming under him by purchase, gift, or descent. The statute also provides, that a tenant *per auter vie*, his executors and administrators, may, after the death of *cestui que vie*, have an action of debt, or may distrain for such arrears in- [451] curred in the lifetime of *cestui que vie*.

Before the passing of this act, the inconvenience did not exist to the same extent, in regard to the executor of tenant for his own life, or to the executor of tenant *per auter vie* after the death of *cestui que vie*: for by the common law an executor in either of those cases had a remedy, by action of debt, for the arrears of rent which had accrued in the lifetime of the testator (*e*). But it has been adjudged, that the statute, being remedial, applies to the executors of all tenants for life; not merely to such executors as previously to the statute had no remedy whatever, but also to those who were entitled to an action of debt, to whom, therefore, it gives merely the additional remedy of distress (*f*). Yet, although the executors of all tenants for life be authorized by the statute to distrain for such arrears (*g*), it seems that rent reserved on a lease for years is not within its provisions, inasmuch as the landlord is not tenant in fee, fee-tail, or for life, of such a rent; and the executors

(*b*) Clerk v. Withers, 6 Mod. 299, 300.

(*c*) Yaites v. Gough, Yelv. 33.

(*d*) Vid. 3 Bac. Abr. 91. 2 Bac. Abr. 282, in note. 4 Burn. Eccl. L. 268.

(*e*) Harg. Co. Litt. 162, note 4. Gilb. L. of Distress, 3d edit. 33.

(*f*) Harg. Co. Litt. 162 b. note. Hool v. Bell, 1 Ld. Raym. 172. Cro. Eliz. 322. L. of Ni. Pri. 5th edit. 55. Gilb. L. of Distress, 3d edit. 33. Sed vid. Cro. Car. 471.

(*g*) Hool v. Bell, 1 Ld. Raym. 172.

(1) An administrator *de bonis non* cannot sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; such suit may be brought directly by creditors, legatees or distributees. *Colman, Adm. v. McMurdo*, 5 Rand. Rep. 51.

of such tenants only are mentioned in the act (*h*). However, in trespass, where it appeared the defendant had distrained the plaintiff's goods for rent due to his testator on a lease for years, Lee, C. J. held it to be comprehended by the statute, and the defendant obtained a verdict (*i*).

Nor does the statute extend to the executor of the grantee of a rent-charge for a term of years, if he so long live (*k*) ; nor to copyhold rents, but only to rents out of free land (*l*).

But the executor of an executor is held to be within the equity of this statute (*m*).

An executor may also prove a debt due to the testator under a commission of bankruptcy (*n*).

A commission was taken out by an executor before he had obtained probate. Probate was afterwards obtained on the 5th of March, 1817, and the adjudication of the bankruptcy was on the 8th of March following, and the commission was held valid (*o*).

In case a commission has been superseded, the executors of the party, against whom it issued, may take out a commission for a debt due to him ; but if it has not been superseded, they have no such right ; for the debt having vested in his assignees, the executors are incapable of being the petitioning creditors (*p*).

Executors, in their representative character, may sign a bankrupt's certificate (*q*). And even where the bankrupt's father, being principal creditor, chose himself sole assignee, and dying intestate, the bankrupt, as his representative, chose himself assignee, and signed his own certificate, it was held regular (*r*). But an executor, who has also a claim in his own right, cannot sign in both capacities (*s*).

If a bankrupt's estate pay a clear dividend of ten shillings in the pound, and he obtain his certificate under the commission, his representatives are entitled to the allowance (*t*).

By the stat. 19 *Geo. 2. c. 37. s. 4.* it is enacted, that in case an assurer shall die, his executors or administrators may make re-assurance to the amount before by him assured, provided it be expressed in the policy to be a re-assurance : and thus a fund may be secured to satisfy the insured in case of a loss, without its falling on the estate of the deceased.

In case of the death of a person insured against fire, the policy

(*h*) *L. of Ni. Pri.* 5th edit. 57. *Gilb. L. of Distress*, 3d edit. 34.

(*i*) *Powel v. Killick*, at Westminster, *M. 25 Geo. 2.*

(*k*) *L. of Ni. Pri.* 5th edit. 57.

(*l*) 2 *Bac. Abr.* 282, in note. *Appleton v. Doily*, *Yelv.* 135. *Sed vid. Carth.* 91.

(*m*) *Off. Ex.* 258.

(*n*) *Ex parte English*, 2 *Bro. Ch. Rep.* 610.

(*o*) *Ex parte Paddy in re Drakely*, 3 *Madd. Rep.* 241. and see *Rogers v. James*, 2 *Marshall*, 425.

(*p*) *Ex parte Goodwin*, 1 *Atk.* 100.

(*q*) *Whitmarsh's B. L.* 2d edit. 356. 1 *Atk.* 85.

(*r*) *Ibid.* *Green*, 260.

(*s*) *Ex parte Sausmerez*, 1 *Atk.* 85.

(*t*) *Whitmarsh's B. L.* 2d edit. 351. *Ex parte Calcot*, 1 *Atk.* 208, 209. *S. C.* 3 *Atk.* 814.

of insurance and interest therein shall continue to his heir, executor, or administrator respectively, to whom the property insured shall belong, provided, before any new payment be made, such heir, executor, or administrator shall procure his right to be indorsed on the policy at the office, or the premium be paid in the name of the heir, executor, or administrator (*u*).

[154] SECT. II.

Of remedies for executors and administrators in equity.

AN executor or administrator is also entitled to all the equitable interests of the deceased, and may, in his representative capacity, enforce them in a court of equity (*a*).

Such interest vested in the testator shall vest in the executor, although he be not named : as if a legacy be given to A., and if he die under age, to B. and C., or the survivor of them ; and first B. die, then C., and lastly A. die under age, the legacy shall be decreed to the executor of C. who survived B. (*b*).

Partners in trade are interested in the whole stock and effects, not merely in that particular stock in being at the time of entering the partnership, but continue so through all its changes. In case of the death of one partner, his interest, as we have seen (*c*), at law vests in his representatives, and shall not survive to the other, although the legal remedy survive : in equity, the survivor is regarded as a trustee for them, on which footing the account shall be taken, nor any thing considered as his share till after it ; inasmuch [455] as the property in the stock continues in such representatives : and they have a specific lien upon it, although the survivor should afterwards die, or become bankrupt (*d*). The representatives of a deceased partner, or the assignees of a bankrupt partner, are not, strictly speaking, partners with the survivor, or the solvent partner ; but, in either case, that community of interest still subsists, which is necessary till the affairs are wound up, and which requires that what was partnership property before, shall continue so for the purpose of distribution, according to the rights of the partners (*e*). (1)

(*u*) Park on Insurance, 449, 5th ed. 2 Ventr. 347.

(*a*) Vid. Com. Dig. Chancery, 2 B.

(*c*) Supr. 155, 156. 163.

1. 3 G. 1.

(*d*) West v. Skip, 1 Ves. 242.

(*b*) Com. Dig. Chancery, 3 G. Anon.

(*e*) Ex parte Williams, 11 Ves. jun. 5.

(1) In *Pennsylvania*, when a surviving partner dies indebted to partnership and separate creditors, and leaving in the hands of his administrator joint property and also separate property, his whole estate, that is to say, his whole separate

If, pending a suit, the plaintiff die, his executor may continue it by bill of revivor, and have the full benefit of the proceedings (*f*).

The executor of a person having written private letters to J. S. may maintain a bill in equity to restrain J. S. or his representatives from publishing them without the leave of the plaintiff (*g*).

If the executor find the affairs of the testator so complicated, as to render the administering of the estate unsafe, he may institute a suit against the creditors, for the purpose of having their several claims adjusted by the decree of the court (*h*). But such bill will not entitle him to an injunction to restrain any creditor from proceeding against him at law: for that purpose, it is necessary that there be a suit and decree, by and on behalf of the creditors of the testator (*i*).

A decree against him in such suit to account is, however, sufficient to ground such an application; and therefore, if after such decree a creditor of the testator proceed at law, the executor may [456] move that the creditor may be restrained from thus proceeding, and be directed to come in under the decree, and prove his debt before the master with the other creditors of the testator: but an affidavit by the executor, that he had paid all the assets into court, is indispensably necessary to support the motion, and such creditor shall be allowed the costs of his proceedings at law before actual notice of the decree (*k*). If he proceed at law after such notice, he shall be subject to the costs of the subsequent proceedings (*l*). If the creditor proceeding at law has recovered a judgment *de bonis testatoris*, the court will restrain him from taking out execution; but if he has obtained a verdict, which will entitle him to a judgment *de bonis propriis* against the executor, the court will not restrain him from proceeding at law (*m*).

However in a later case, where after a decree for the administration of assets, an executor pleaded a false plea to an action brought

(*f*) Mitf. 63, 64.

(*g*) Thompson v. Stanhope, Ambler 737.

(*h*) Com. Dig. Chancery, 3 G. 6. 2 Fonbl. 2d edit. 408, note (t). Bucele v. Atleo, 2 Vern. 67.

(*i*) 2 Fonbl. ibid. Rush v. Higgs, 4 Ves. jun. 638.

(*k*) Gilpin v. Lady Southampton, 18 Ves. 469. and see Jackson v. Leaf, 1 Jac. & Walk. 229.

(*l*) Potts v. Layton, Exx. Mich. T. 1802, at Westminster, before Sir William Grant, M. R. sitting for Lord Eldon, C. and afterwards in the same term before Lord Eldon, C. See also Kenyon v. Worthington, Dick. Rep. 668.

(*m*) Terrewest v. Featherby, 2 Mer. Rep. 480. and Brook v. Skinner, in note.

property and his whole interest in the joint property, is to be divided among all his creditors (joint and separate) of equal degree, equally, *pro rata*. *Bell, Ex. v. Newman, Adm.* 5 Serg. & Rawle, 78. In such a case in *South Carolina*, co-partnership funds are first applicable to co-partnership debts, and private funds to private debts. *Waddrop v. Ward, Ee.* 3 Desaus. Rep. 203. *Hall v. Hall*, 2 McCord's Cha. Rep. 302.

against him by a creditor of the testator, in order that he might have an opportunity to apply for an injunction to restrain the action, Sir J. Leach, V. C. granted the injunction, and said, he considered the law to be settled according to the doctrine laid down by Lord Mansfield in *Harrison v. Beccles*, cited in *Irving v. Peters*, 3 T. R. 688, that an executor who pleaded *plenè administravit*, was liable only to the extent of assets of the testator come to his hands (m). (1)

It is a general principle, that an executor shall have no allowance in equity for his trouble in the execution of the trust reposed on him, unless directed by the will (n); (2) and least of all where a legacy is expressly left him as a recompence. Nor is the case altered by his renunciation of the executorship, and his afterwards assisting in it; nor although it appear that he has deserved more, and has benefitted the estate to the prejudice of his own affairs (o). And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trou-

(m) *Fielden, v. Fielden* 1 Sim. & 1 Ves. 115. *Scattergood v. Harrison*, Stu. 255, and see *Dyer v. Kearsley*, 2 Mosel. 128. *vid. Barwell v. Parker*, Meriv. 482, in note. and *Lord v. 2 Vez. 365.*
Wormleighton, 1 Jacob. 148.

(n) 11 Vin. Abr. 433. *Robinson v. 249.*
Pett, 3 P. Wms. 251. *Ellison v. Airey*,

(1) *Siglar et al. Adm. v. Haywood*, 8 Wheat. Rep. 675.

(2) In *Pennsylvania*, so far back as the testamentary law can be traced, executors have had a compensation for services (3 Binn. 560.). The Act of March 27th, 1713, (Purd. Dig. 610. 1 Dall. Laws, 98. 1 Sm. Laws, 81.) establishing Orphans' Court, provides that the Orphans' Court may "order the payment of such reasonable fees for copies [of bonds, inventories, accounts, actings and proceedings whatsoever of guardians, trustees, tutors, executors and administrators] and for all other charges, trouble, and attendance, which any officer, or other person, shall necessarily be put to in the execution of this act, as they shall think equitable and just." This act has always been construed as allowing commissions to executors and administrators (*Prevost v. Gratz*, 3 Wash. C. C. Rep. 434.), whose right to commissions is so well established, that they must release them in order to become witnesses. *Anderson v. Neff*, 11 Serg. & Rawle, 208. *Gebhard v. Shindle*, 15 Serg. & Rawle, 235. *Patton v. Ash*, 7 Serg. & Rawle, 116. The amount of commissions is a matter in the discretion of the Court, (*Pusey v. Clemson*, 9 Serg. & Rawle, 204.) and the number of the executors does not make any difference in the rate: if their trouble be unequal, a share of the commissions ought to be assigned to each proportioned to his trouble. *Case of Walker's Estate*, 9 Serg. & Rawle, 223.

In *Maryland*, by statute, the commission to be allowed to an executor or administrator is submitted to the discretion of the Orphans' Court, and is not to be under five *per cent.* nor exceeding ten *per cent.* on the amount of the inventory. *Nichols v. Hodges*, 1 Peters' S. C. Rep. 562.

In *New-York*, previous to the Act of 15th April, 1817, an executor was not entitled to any compensation for his services: that act authorizes the Court of Chancery to make an allowance to executors and administrators for their services according to a fixed rate, and to fix that rate; but does not authorize the Court to make a special allowance without regard to a fixed rate. *M^rWhorter v. Benson*, 1 Hopk. Cha. Rep. 28. 7 Johns. Cha. Rep. page 266 of the Index.

ble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship; and on his dying before the execution of the trust was completed, [457] his executors filed a bill to be allowed that sum out of the trust money in their hands, the court refused the claim, observing, that independently of the executors having died before the trust was executed, such bargains ought to be discouraged as tending to dissipate the property (*p*). But an executor in India of a party domiciled in that country, not having a legacy, was held, on passing his accounts in the court of chancery here, to be entitled to a commission at the rate of 5 *per cent.* on receipts and payments, according to the practice in India (*q*). So where, after goods were consigned to a factor, the principal died, having appointed him executor, and then the goods came to his hands, it was decreed, that he should be allowed factorage and commission for them (*r*). If, however, an executor in India has a legacy for his trouble, he will not be entitled to commission, either on his receipts or payments as executor; nor will he be allowed in passing his accounts, after a series of years, to renounce his legacy, and charge commission on such receipts and payments (*s*).

If two executors are plaintiffs in equity, and one of them is excommunicated, the other may be severed, and the defendant shall answer him (*t*). One executor may sue his co-executor in equity (*u*). In case of a suit by co-executors, the proceedings do not abate by the death of one of them (*v*).

If a temporary executor prove the will, and afterwards his executorship determine, the subsequent executor may maintain a suit without another probate (*w*).

An administrator shall be relieved in chancery against a fraud to his administration: as if the grant be wrongfully obtained, and afterwards repealed on citation, an assignment of a term by the grantee in trust for himself shall be revoked, and avoided by the subsequent administrator (*x*).

If a bill be brought by an administrator *durante minoritate*, and pending the suit the executor come of age, he may continue the suit by a supplemental bill (*y*).

In case an administration be determined by death, a bill of revivor by a subsequent administrator has been admitted (*z*).

(*p*) Gould v. Fleetwood, Mich. 1732. at the Rolls, cited 3 P. Wms. 251, note (*a*).

(*q*) Chetham v. Lord Audley, 4 Ves. jun. 72.

(*r*) Scattergood v. Harrison, Moscl. 128.

(*s*) Freeman v. Fairlie, 3 Meri. Rep. 124.

(*t*) Prac. Reg. in Chancery, 2d edit. 209.

(*u*) Ibid. Vid. 11 Vin. Abr. 363. 355. 3 Bac. Abr. 32.

(*v*) Hinde's Prac. in Chan. 47.

(*w*) Pract. Reg. 2d edit. 209. 1 Ch. Ca. 265.

(*x*) 2 Ch. Ca. 129. Com. Dig. Chan. 2 B. 1.

(*y*) Mitf. 61.

(*z*) Mitf. 61, in note. Owen v. Curzan, 2 Vern. 237. 2 Eq. Ca. Abr. 3, 4.

SECT. III.

Of remedies at law against executors and administrators.

I AM now in the last place, to treat of the remedies against executors and administrators, or the means which the law prescribes to enforce the performance of their various duties.

As representatives of the deceased they are answerable, whether expressly named or not, as far as they have assets, for all his debts, covenants, and other contracts (*a*). An executor is thus liable for all debts due from the testator by judgment, statute, recognizance, obligation, or other debts by record or specialty (*b*).

So an action of debt lies against the executor of a sheriff, on a judgment recovered against the testator, for an escape (*c*).

So an action may be maintained against an executor on other inferior debts of record, as issues forfeited, fines imposed at the assizes, quarter sessions, by commissioners of sewers, or bankrupts, by stewards in leets, or the like (*d*).

He is also subject to an action on the testator's obligation : or on his covenant, as to pay rent (*e*), or to repair premises (*f*). An executor may, likewise, be sued by the lord of the manor for a relief due from the testator (*g*). So an action lies against an executor on [460] simple contract of the testator, either in writing or by parol, either express or implied ; as on bills of exchange and promissory notes, debt for rent on a parol lease (*h*), or *assumpsit* for money had and received by the testator to the plaintiff's use (*i*). So an action may be maintained by a gaoler against an executor for provisions found for the testator in prison (*k*) : or against the executor of a sheriff, who levied money on a *fieri facias*, and died before he paid it (*l*) : or, as it seems, against an executor on a collateral promise by the testator (*m*), as where he promised to give A. a sum of money in consideration that he would marry B.

(*a*) 3 Bac. Abr. 95. Off. Ex. 117, 118. Cro. Car. 187. *Morgan v. Greene*, Jon. 223. *Howse v. Webster*, Yelv. 103. Dyer, 23.

(*b*) Com. Dig. Admon. B. 14. Off. Ex. 118.

(*c*) Dyer, 322.

(*d*) Com. Dig. Admon. B. 14. Off. Ex. 118.

(*e*) *Billingham v. Speerman*, Salk. 297. Sti. 387. 406. Com. Dig. Covenant, C. 1.

(*f*) *Tilney v. Norris*, Carth. 519.

S. C. Salk. 309. S. C. Ld. Raym. 553.

(*g*) Com. Dig. Admon. B. 14. Noy. 43, 44.

(*h*) Com. Dig. Admon. B. 14.

(*i*) 9 Co. 89 b. 10 Co. 77 b. Cro. Car. 294. Plowd. 182.

(*k*) 9 Co. 87 b.

(*l*) Com. Dig. Admon. B. 14. 1 Roll. Abr. 921. Jon. 430. Mar. 13.

(*m*) Com. Dig. Admon. B. 14. 1 Roll. Rep. 14. Cro. Jac. 404. 3 Bul. 2. 6. Sti. 158. Ow. 56, 57. Palm. 329. Jon. 16.

In short, in all cases where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator, express or implied ; the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* supposed to be by force and against the king's peace, there the action dies, as battery, (1) false imprisonment, trespass, (2) slander, nuisance, (3) diverting a watercourse, escape, or on a penal statute, and many other cases of the like kind (*n*).

[461] Such are the species of actions which survive against an executor, or die with the person on account of the *cause* of action. But there are other species of actions, which survive or die in respect of the *form*.

In some actions the defendant could have waged his law, as in debt on a simple contract, and therefore no action in that form lies against an executor ; but now other actions are substituted in their room, on the very same cause, which survive and may be maintained against him.

No action, where in form the declaration must be, *quare vi et armis, et contra pacem*, or where the plea must be, that the testator was not guilty, will lie against an executor. (4)

On the face of the record the cause of action arises *ex delicto*, and all private criminal injuries, or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, another action may be brought, which will answer the purpose. An action on the custom of the realm, against a common carrier, is for a *tort* and supposed crime ; the plea is not guilty, and therefore an action will not lie against an executor ; but *assumpsit*, which is another action for the same cause, is maintainable. So if a man take a horse from another, and bring him back again, an action of trespass will not lie against the [462] executor, though it would have lain against the party himself. (5) But an action for the use and hire of the horse will lie against the executor (*o*). Nor is the executor chargeable for the injury done by his testator in cutting down another man's trees ; but for the benefit arising to the testator from the value or sale of the trees, he may be called upon to answer (*p*). Nor will trover

(*n*) Com. Dig. Admon. B. 15. Off. Ex. 127, 128. 3 Bl. Com. 302. Ham- bly v. Trott, Cowp. 375.

(*o*) Hamby v. Trott, Cowp. 375.
(*p*) *Ib.* Cowp. 376.

(1) *Miller v. Umbhower*, 10 Serg. & Rawle, 31.

(2) *Nicholson v. Elton*, Adm. 13 Serg. & Rawle, 415.

(3) *Hawkins v. Cluss*, 1 Bibb's Rep. 246.

(4) *Nicholson v. Elton*, Adm. 13 Serg. & Rawle, 416.

(5) *Trespass for mesne profits of land recovered in ejectment lies against an executor in Virginia, Lec v. Cooke's Ex.* Gilm. Rep. 331.

lie against an executor for a conversion by his testator ; (1) for in that case the form of the plea is, that the testator was not guilty, and the issue is to try the guilt of the testator : But if the testator sold the property in his lifetime, his executor shall be charged in an action for money had and received by the testator to the plaintiff's use.

The fundamental distinction, then, is this : If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer ; as for example, beating or imprisoning a man, there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury, and therefore the executor is not liable : But where, besides the crime, property is acquired which benefits the testator, an action for the value of the property shall survive against the representative (*q*). (2)

The executor is also liable on contracts of the testator, although [463] the cause of action accrue not till after his death : as on a bond which becomes due, or a note payable subsequently to that event (*r*).

The liability of an executor to the payment of rent incurred after the testator's death, has been already considered (*s*).

In the cases which I have been enumerating, the executor shall be liable only to the amount of the assets (*t*). (3) The judgment against him is for the debt or damages, to be levied on the goods and chattels of the testator in the hands of the defendant, if he have so much thereof in his hands to be administered (*u*). But there are cases in which he shall be personally responsible, *de bonis propriis* ; as if he commit any of those acts which constitute a *devastavit*, on its being duly substantiated, he must answer out of his own estate for the value of what he has wasted (*x*). (4) An executor may also make himself chargeable in his private capacity to the plaintiff's demands, by pleading a plea the falsehood of which lies in his own knowledge, and which, if true, would be a perpetual bar

(*q*) Ibid. Cowp. 376, 377.

(*r*) Com. Dig. Pleader, 2 D. 2.

(*s*) Vid. supr. 278. et seq.

(*t*) 9 Co. 88 b.

(*u*) Vid. Tidd's Prac. B. R. 941. and infr.

(*x*) Com. Dig. Admon. 1. 3. 3 Bac. Abr. 77. Off. Ex. 157. 164.

(1) *Hench v. Metzger*, Ex. 6 Serg. & Rawle, 272.

(2) *Lattimore v. Simmons*, 13 Serg. & Rawle, 185.

(3) In *assumpsit* against executors, founded upon their assumption as executors, on a consideration existing in the lifetime of the testator, the declaration need not aver assets. *Malin v. Bull*, 13 Serg. & Rawle, 441.

(4) *Wilson v. Long*, 12 Serg. & Rawle, 58. But no contract arises upon a *devastavit*, which will suppose an action against the executor personally, nor is a *devastavit* a trespass within the meaning of the Act of 22d March, 1814, (Purd. Dig. 460.) giving jurisdiction to justices of the peace, in cases of trespass for injuries committed on real or personal estate. *ibid*.

to the action (*y*); (1) therefore if an executor plead *ne unques executor*, that he never was executor (*z*), or plead a release made to himself (*a*), and it is found against him; the judgment shall be in [464] the alternative, *de bonis testatoris, et si non, de bonis propriis*. An executor may also make himself personally liable by his promise to pay a debt of the testator, or answer damages out of his own estate; (2) but pursuant to the statute of frauds, such promise, or some note or memorandum thereof must be in writing, and signed by him, or some other person by his authority (*b*). (3) There must also be a sufficient consideration to support the promise: It must be alleged and proved, that assets were come to his hands; or that in consideration the creditor would forbear to sue him, he promised to pay the debt (*c*): Or an admission of assets must be implied from the nature of the promise itself; as where the defendant owned the money lay ready for the plaintiff whenever he would call for it (*d*): and where executors gave a note to a creditor whereby they promised "as executors" to pay, &c. with interest (*e*). (4) In all these cases the executor shall be liable to the same species of judgment. Forbearance to sue, although the remedy be only in equity, is a sufficient consideration (*f*).

(*y*) Off. Ex. 85. 3 Bac. Abr. 87. 1 Roll. Abr. 93. Godolph. 98. 11 Vin. Abr. 388. Howard v. Jemmet, 1 Bl. Rep. 400.

(*z*) 1 Roll. Abr. 930. 933.

(*a*) Cro. Jac. 671, 672.

(*b*) Vid. stat. 29. Car. 2. c. 5. s. 4. Hawkes v. Saunders, Cowp. 289. and Rann v. Hughes, 7 Bro. P. C. 551.

(*c*) Trevinian v. Howell, Cro. Eliz.

91. Reech v. Kennegal, 1 Ves. 125.

Hawkes v. Saunders, Cowp. 293.

Rann v. Hughes, 7 Bro. P. C. 551.

(*d*) Camden v. Turner, cited Cowp. 293.

(*e*) Childs v. Monins, 2 Brod. & Bing. 460.

(*f*) 3 Bac. Abr. 90. 1 Sid. 89. Scott v. Stephenson, 1 Lev. 71. 1 Roll. Rep. 27.

(1) *Siglar v. Haywood*, 8 Wheat. 675. The plea of *plene administravit*, though not sustained, is not necessarily a false plea within his own knowledge; and, if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only. *ibid.* Nor are the pleas of *non assumpsit*, and *non assumpsit infra*, &c. pleaded by administrators, though found against them, such false pleas as will subject them personally to costs. *Evans, Adm. v. Pierson*, 1 Wend. Rep. 30. See, as to what pleas are false pleas, *Ousterhout v. Hardenburgh*, 19 Johns. Rep. 267.

(2) See *Forbes v. Perrie, Adm.* 1 Harr. & Johns. 109. A declaration setting forth an implied promise by an administratrix, *as such*, to pay money paid, laid out, and expended by the plaintiff for her use as *administratrix*, in consequence of the payment, after the death of the intestate, of a debt for which he and the plaintiff were jointly liable in his lifetime, is good; and a judgment *de bonis intestati* founded upon it may be supported. *Collins, Adm. v. Weiser*, 12 Serg. & Rawle, 97. *Giles v. Bacon's Adm.* 1 Harr. & Gill. 164. *Whitaker v. Whitaker*, 6 Johns. Rep. 112.

(3) The Act of Assembly of March 21st, 1772, "for prevention of frauds and perjuries," (Purd. Dig. 516, 1 Dall. Laws, 640, 1 Sm. Laws, 389.) contains no provision requiring that the promise should be in writing.

(4) *Shields et al. Ex. v. Owens*, 1 Rawle, 72. *Curtis v. The Bank of Somerset*, 7 Harr. & Johns. 25. *Geyer v. Smith*, 1 Dall. Rep. 347. *n.*

But, in case there be no assets, a promise by an executor to pay a debt of the testator is *nudum pactum* (g). (1) And on a plea of *plene administravit*, proof of an admission by the executor *that the debt was just, and should be paid as soon as he could*, is not evidence to charge him with assets (h).

Nor shall an executor's paying interest on a bond due from the testator be considered as an admission of assets for the principal (i). Nor shall an executor's merely submitting to an award amount to an admission of assets (k). (2) But if the executor bind himself by a personal engagement to perform the award; or if his submission to arbitration be a reference, not only to the cause of action, but also of the question, whether he has or has not assets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determine, as between the parties, that the executor had assets to pay the debt. The defendant therefore is concluded by the award, although it will not operate as an admission of assets in any other litigation, and he may be attached for non-payment (l). (3)

According to a modern decision, an action may be maintained in a court of common law against an executor, in that character, on his express promise to pay a legacy in consideration of assets (m). (4) And in another case it was also ruled that on the same promise, grounded on the same consideration, action will lie against an executor personally in his own right (n).

(g) *Pearson v. Henry*, 5 Term Rep. 8. *Pearson v. Henry*, 5 Term Rep. 7. *Worthington v. Barlow*, 7 Term Rep.

(h) *Hindsley v. Russel*, 12 East, 232. 453.

(i) *Pearson v. Henry*, 5 Term Rep. 8. (m) *Atkins v. Hill*, Cowp. 284.

(k) *Ibid.* 5 Term Rep. 6. (n) *Hawkes v. Saunders*, Cowp. 289.

(l) *Barry v. Rush*, 1 Term Rep. 691.

(1) *Landis v. Urie*, 10 Serg. & Rawle, 316.

(2) *Hoare v. Muloy*, 2 Yeates, 161. *Swicard v. Wilson*, 2 Rep. Const. Ct. So. Carolina, 208. There was no decision called for in the *nisi prius* case of *McKee v. Thompson*, Addis. Rep. 24, where a contrary doctrine was advanced by the Court, to whom, as it is stated in the note, the case of *Pearson v. Henry* was not known when the cause was argued on the motion in arrest of judgment.

(3) A confession of judgment generally by an executor or administrator in an action brought against him, is an admission of assets to the amount of the debt, (*Griffith v. Chew*, 8 Serg. & Rawle, 17. *Den v. De Hart*, 1 Halst. Rep. 450.) but confession of judgment *de bonis*, by agreement, in an amicable action, is not conclusive proof in *Pennsylvania* of the existence of assets in a suit suggesting a *destravit*, but the existence of assets must be proved by evidence *aliunde*. And where an administrator confesses a judgment which is afterwards reversed, he is not precluded, in a subsequent suit, from showing the want of assets. *Greene v. Stone*, 1 Harr. & Johns. 405.

(4) *Clark v. Herring*, 5 Binn. 33. See *McNiell v. Quince*, 2 Hayw. Rep. 153. But no contract, independent of express promise in consideration of assets, arises between the executor and legatee to pay a legacy, nor does any action at common law lie to recover it; the remedy of the legatee is given him by the Act of Assembly of 21st March, 1772. (Purd. Dig. 517.) *Wilson v. Long*, 12 Serg. & Rawle, 58.

But this doctrine has been exploded by subsequent adjudications. It is true, that in the case on which one of them was founded, the [466] executor had not, as in two former instances, *expressly* promised to pay the legacy; yet two of the three learned judges, who decided it, reasoned on general principles, and denied the jurisdiction of the courts of common law over the subject of legacy, without reference to any distinction between an express and an implied promise. They held, that policy and convenience forbade the courts of common law to entertain this species of action, since they can impose no terms on the party suing: Whereas courts of equity in such suits interfere in a manner highly beneficial to private families; as on a bequest of a legacy to the wife, they require the husband to make an adequate settlement on her, as the condition of his recovering it (*n*): But if he might resort to an action, the wife and children would, in a variety of instances, be left destitute of all provision. They also observed, that the only other precedent of such an action occurred in the time of the usurpation; and the reason there assigned for allowing it, was to prevent a failure of justice, as the ecclesiastical courts were at that time abolished, and the court of chancery did not then take cognizance of legatory matters, and these principles have been adhered to in decisions still more recent (*o*). (1)

Although an executor be entitled, as we have seen (*p*), to sue in [467] a court of conscience, he is not liable to be sued there. The legislature could not intend to give to such a court an authority to inquire into the conduct of executors, and to take an account of assets (*q*).

Executors and administrators shall not in general be held to bail, for they are not personally liable, but only in respect of the assets. It were unreasonable to subject them to an arrest in their representative capacity (*r*). (2) But they may be held to bail, if it appear that they have wasted the property (*s*). (3) Yet a bare suggestion of a *devastavit* is not sufficient for that purpose without the oath of

(*n*) Vid. *Browne v. Elton*, 3 P. Wms. 202. and *supr.* 320, 321.

(*o*) *Deeks v. Strutt*, 5 Term Rep. 690. Vid. also *Farish v. Wilson*, *Peake's Ni. Pri. Rep.* 73. See 4 Bac. Abr. 446. in note. *Rawlinson v. Shaw*, 3 Term Rep. 557. and *Mayor of Southampton v. Graves*, 8 Term Rep. 593.

(*p*) *Supr.* 436.

(*q*) Stat. 14 G. 2. c. 10. Doug. 263. *Tidd's Prac. B. R.* 873.

(*r*) 3 Bac. Abr. 101. Cro. Jac. 350. *Hargrave v. Rogers*, Yelv. 53. Sir Henry Mildway's case, Cro. Car. 59. Litt. Rep. 2. 1 Crompt. Prac. 29.

(*s*) 1 Crompt. Prac. 29. Anon. 1 Lev. 39. *Dupratt v. Testard*, Carth. 264. Anon. 1 Mod. 16.

(1) *Pelletreau v. Rathbone*, 18 Johns. Rep. 429. See also the cases in notes (*a*) (*b*) to that case.

(2) An executor in *Pennsylvania* may be proceeded against by *capias*, to compel an appearance. *Penrose v. Penrose*, Ex. 2 Binn. 440, cited.

(3) *Hartness v. Purcell*, 1 Wend. Rep. 303.

the plaintiff (*l*). So where on a judgment against an executor execution is sued out, and the sheriff returns a *devastavit*, in an action to debt on the judgment the executor may be required to put in special bail (*u*). (1) Where an executor has personally promised to pay a debt, it seems he may be holden to bail on such promise (*w*).

An executor defendant shall pay costs in case he plead a plea which is false within his own knowledge. And the judgment for the costs is *de bonis testatoris, et si non, de bonis propriis* (*x*). (2) [468] So where a bankrupt who was sued as executor, pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which the defendant obtained his certificate, it was held that the judgment for the costs was not discharged by the certificate (*y*). But where an executor pleads *plene administravit*, and the plaintiff admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs (*z*). (3) Nor, as it seems, is he so liable where he pleads *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro* (*a*). (4) So where an executor pleads several pleas to the whole declaration, as *non assumpsit*, *ne unques executor*, and *plene administravit*, and one of them is found for him, he is entitled to the postea and costs, although the other plea be found against him (*b*). (5) But if the plaintiff take judgment of assets *in futuro* on the plea of *plene administravit*, and go to trial on the plea of *non assumpsit*, he will be entitled to costs, if he obtain a verdict; and, therefore, in such case, unless the defendant have a good ground of defence on *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to

(*l*) 3 Bac. Abr. 101. 1 Crompt. v. Spencer, 7 Term Rep. 359. Prac. 101.

(*u*) 3 Bac. Abr. 101. Dubray v. Howard v. Jemmet, 3 Burr. 1368. Comb. 206. Boothby v. Butler, 1 S. C. 1 Bl. Rep. 400.

(*w*) Mackenzie v. Mackenzie, 1 Sid. 63. (z) Tidd's Prac. B. R. 896. Imp. Prac. B. R. 428.

(*x*) 3 Bac. Abr. 100. Tidd's Prac. B. R. 896. Plowd. 183. Hardr. 165. Noel v. Nelson, 2 Saund. 226. S. C. Sid. 448.

(*y*) 3 Bac. Abr. 100. Tidd's Prac. B. R. 896. Plowd. 183. Hardr. 165. Noel v. Nelson, 2 Saund. 226. S. C. Sid. 448.

(*a*) See Rast. Ent. 323. 8 Co. 134. (b) Edwards v. Bethee, 1 Barn. and Newman, 4 Term Rep. 641. Bollard Ald. 254.

(1) A refusal to apply the assets to the payment of debts does not amount to a *devastavit*; nor does a declaration by the executor, of intention to leave the country and not to return, justify an order to hold to bail. *Hartness v. Purcell*, 1 Wend. Rep. 303.

(2) *Siglar v. Haywood*, 8 Wheat. Rep. 675. As to what pleas are false pleas, see *ante*, page 463, note (1).

(3) *Pope, Adm. v. Delavan et al.* 1 Wend. Rep. 68. *Wellborn v. Gordon*, 1 Murph. 103.

(4) *Ford v. Crane*, 6 Cow. Rep. 71.

(5) *Ousterhout v. Hardenbergh*, 19 Johns Rep. 266.

do on payment of costs (*c*). An executor defendant shall have costs in case of a judgment in his favour (*d*).

[469] If the defendant die after final judgment, and before execution, the plaintiff shall sue out the same by *scire facias* against the personal representatives (*e*). But a *fieri facias*, if tested before the defendant's death, although not delivered to the sheriff till after it, may, without a *scire facias*, be executed on his goods in the hands of his executor or administrator (*f*). (1) And, as we have seen (*g*), a judgment signed at any time during the term, or the vacation next following, relates back to the first day of the term, although the defendant died before the judgment was actually signed; and an execution tested the first day of the term may be taken out upon it against the goods (*h*). (2)

A judgment recovered against an executor or administrator is, as we have seen (*i*), usually for the debt or damages and costs, to be levied of the goods and chattels of the testator or intestate in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if he hath not, then the costs to be levied of his own proper goods (*k*). In such case the course is for the plaintiff to sue out a *fieri facias de bonis testatoris*, &c. *et si non, de bonis propriis*, according to the judgment (*l*), upon which the sheriff [470] returns either *nulla bona* generally, or *nulla bona*, and a *devastavit* by the defendant (*m*). On the former return, the plaintiff must proceed by *scire fieri* inquiry (*n*), or by action of debt on the judgment suggesting a *devastavit*. On the latter he may have execution immediately against the defendant by *capias ad satisfaciendum*, or *fieri facias de bonis propriis* (*o*). (3) So, on a *devastavit* returned, a writ of *elegit* will lie against an executor or administrator (*p*).

(*c*) Tidd's Prac. B. R. 896, 897. Rep. 20.

Dearne v. Grimp, 2 Bl. Rep. 1275. (*i*) Supr. 463.

Hindsley v. Russel, 12 East, 232. (*k*) Tidd's Prac. B. R. 941. Farr v.

(*d*) 3 Bac. Abr. 100. Newman, 4 Term Rep. 648. Bollard

(*e*) Com. Dig. Execution, (F.) Pleader, 3 L. 7. Dy. 76 b. Tidd's Prac. B. R. 1056. Heapy v. Parris, 6 Term Rep. 268. Bragner v. Langmead, 7 Term Rep. 24.

(*f*) Com. Dig. Execution, D. 2. F. Semb. Anon. 2 Ventr. 218. R. Skin. 257.

(*g*) Supr. 266.

(*h*) Bragner v. Langmead, 7 Term

(*l*) Supr. 463.

(*m*) Tidd's Prac. B. R. 941. Farr v. Newman, 4 Term Rep. 648. Bollard v. Spencer, 7 Term Rep. 359.

(*n*) Gibson v. Brook, Cro. Eliz. 886.

(*o*) Thes. Brev. 116, 117.

(*p*) Lil. Ent. 664.

(*q*) Tidd's Prac. B. R. 942. Thes. Brev. 46, 47. 122, 125.

(*r*) Tidd's Prac. B. R. 957. 1 Crompt. Prac. 346. 2 Leon. 188.

(1) *Leiper v. Levis*, Adm. 15 Serg. & Rawle, 108.

(2) *Leiper v. Levis*, Adm. 15 Serg. & Rawle, 108; but a judgment creditor obtains no priority over other judgment creditors by levying under an execution so taken out.

(3) *Swearingen's Ex. v. Pendleton's Ex.* 4 Serg. & Rawle, 389.

Of execution against an executor or administrator in case of the defendant's death before final judgment, I have already treated (*q*).

If the plaintiff confess the plea of *plenè administravit*, or *plenè administravit præter*, there shall be judgment in his favour for the debt or damages, and costs to be levied as to the whole or in part, of the goods of the testator or intestate which shall afterwards come to the hands of the defendant to be administered. And such judgment is styled a judgment of assets *quando acciderint*; but in that case execution cannot be had until the defendant shall have goods of the deceased, when the plaintiff may either sue out a *scire facias*, or bring an action of debt on the judgment suggesting a *devastavit* (*r*). (1)

[471] Before the stat. 38 Geo. 3. c. 87. an infant executor, after he had attained the age of seventeen, might have been sued; in which case he was to appear by guardian, and not by attorney, when the same judgment might have been recovered against him as against any other executor (*s*); but in consequence of that act, till he comes of age he is neither capable of suing, nor liable to be sued.

A limited executor is also subject to be sued during the continuance of his office (*t*).

In an action against a married woman executrix the husband must be joined (*u*). On a judgment against husband and wife executrix, if she survive, an action of debt does not lie suggesting a *devastavit* by the husband; for, although, in case she married after the testator's death, she is answerable for the wasting by the husband (*w*), yet she shall not be charged *de bonis propriis* for the costs recovered against him (*x*).

If there be several executors, they must all be sued (*y*), in case they have all administered. But such as have not administered may be omitted (*z*): for although executors themselves must be con-

(*q*) Supr. 443, 444.

(*r*) Tidd's Prac. B. R. 1038, 1039. 1041. 8 Co. 134. and vid. *Dorchester v. Webb*, Cro. Car. 372. Sed vid. *Noel v. Nelson*, 2 Saund. 226. 1 Sid. 448. *Noel v. Nelson*, 1 Lev. 286. *Noel v. Nelson*, 1 Ventr. 94, 95. 2 Keb. 606. 621. 631. 666. 671. Hob. 199. *Gill v. Scrivens*, 7 Term Rep. 29.

(*s*) 3 Bac. Abr. 9. 618. 1 Roll. Abr. 287, 288. Poph. 130. Cro. Jac. 420.

Westcott v. Cottle, 1 Roll. Rep. 380.

(*t*) Vid. Off. Ex. 215, 216.

(*u*) Com. Dig. Admon. D. Off. Ex. 203, 207. 3 Bac. Abr. 9.

(*w*) Vid. supr. 358, 359.

(*x*) Com. Dig. Admon. 1. 3. *Horsy v. Daniel*, 2 Lev. 161.

(*y*) 3 Bac. Abr. 32. Off. Ex. 95.

(*z*) 3 Bac. Abr. 33. *Swallow v. Emberson*, 1 Lev. 161. S. C. 1 Sid. 242.

(1) In *Pennsylvania*, if the executor or administrator has no *personal* assets, he may plead the want of assets against an action by a creditor; and, if the jury find in his favour, no judgment can go against him; but in such case the plaintiff may pray judgment *de terris*, &c. and of assets *quando acciderint*, which is entered of course. *Wilson v. Hurst's Ex.* 1 Peters' C. C. Rep. 411. *The Pennsylvania Agricultural, &c. Bank v. Stambaugh's Adm.* 13 Serg. & Rawle, 300. *Moore v. Kerr, Ex.* 10 Serg. & Rawle, 348.

scious how many are named by the will, and must, as we have seen, [472] frame their action accordingly, yet creditors and strangers are bound to take notice of such executors only as in fact execute the office. If one only confess a judgment, it seems now settled that it shall not bind nor conclude the rest (*a*). If they plead distinct pleas, it is said that shall be received which is best for the estate, or most decisive of the question (*b*). Of co-executors, if some are of full age, and others infants, the action may be against them all; but the latter cannot appear with others by attorney, but must appear by guardian (*c*).

It is clearly settled, that one executor shall not be charged with the *devastavit* of his companion, and shall be liable only to the extent of the assets which came to his hands (*d*), if he has not in any manner contributed to the loss. The testator's having misplaced his confidence in one executor shall not operate to the prejudice of the others (*e*). Nor shall one executor be affected by notice to the other, who conceals it from him, of the existence of a superior demand (*f*). But if there be notice to one executor, and nothing more appears, he shall, it seems, be presumed to have communicated it to the other (*g*).

[473] An executor of an executor shall, as I have already mentioned, pursuant to the stat. 4 & 5 *W. & M. c.* 24. s. 12. be charged on a *devastavit* committed by his testator, in the same manner as such testator would have been, if living (*h*). But although, as we have seen (*i*), an action of debt may be maintained by A. an executor, suggesting a *devastavit* in the lifetime of his testator, on a judgment recovered by such testator against B. also an executor; yet in such case it seems, as against B.'s executor, a *scire facias* is requisite, inasmuch as he was not privy to the judgment (*k*).

It is not enough for the executor of an executor sued for breach of covenant made by the original testator, to plead *plenè administravit* of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading *plenè administravit* by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that

(*a*) Off. Ex. 68. Vid. sup. 359, 360.

(*b*) Off. Ex. 98. 3 Bac. Abr. 33. Godolph. 136. Hudson v. Hudson, 1 Atk. 460. and vid. sup. 359, 360.

(*c*) 3 Bac. Abr. 13. 619. Smith v. Smith, Yelv. 130. Styl. 318. vid. Fitzgerald v. Villiers, 3 Mod. 236. Frescobaldi v. Kinaston, 2 Stra. 784.

(*d*) 2 Bac. Abr. 31. Off. Ex. 161, 162. Godolph. 134. Hawkins v. Day, Amb. 162. Shep. Touchs. 496. Littlehales v. Gascoyne, 3 Bro. Ch. Rep. 71. Sup. 430.

(*e*) Hargthorpe v. Milforth, Cro. Eliz. 318.

(*f*) Littlehales v. Gascoyne, Amb. 162.

(*g*) Ibid.

(*h*) Vid. Com. Dig. Admon. l. 3. 3 Bac. Abr. 99. Off. Ex. 239. Holcomb v. Petit, 3 Mod. 113. Beynon v. Goldins, 2 Bro. Ch. Rep. 324. Vid. sup. 430.

(*i*) Sup. 431, 432.

(*k*) Berwick v. Andrews, Salk. 314. S. C. Id. Raym. 971.

he had no fund out of which any *devastavit* by the first executor could be made good (*l*).

An executor *de son tort* is liable to the action of the lawful executor or administrator, or to that of a creditor; and, in the latter case, may be charged as executor generally (*m*). (1) If there be also a lawful executor, they may be joined in an action by a creditor or sued severally (*n*); but it is otherwise if there be a lawful administrator; he cannot be so joined with an executor *de son tort* (*o*). If a creditor take out administration, he may recover his debt against him who before the grant was executor *de son tort*, as well as the goods of the intestate taken or converted previously to the same (*p*). (2) And if a person act under a power of attorney from one of several executors, who has proved the will, although he cannot be charged as executor *de son tort* during the life of such executor, yet if he continue to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors who has not proved the will (*q*).

[474] A party, as we have seen (*r*), may be an executor *de son tort* of a term, and is chargeable for waste committed by him on the demised premises (*s*). If an executor *de son tort* be guilty of that, or any other species of *devastavit*, or plead *ne unques executor*, and it be found against him, he shall be charged as another executor *de bonis propriis* (*t*): but in general cases he is liable only to the amount of the assets which come to his hands (*u*).

By the stat. 30 *Car.* 2. c. 7. (3) made perpetual by the stat. 4 & 5 *W. & M.* c. 24. above referred to, the executor of an executor in

(*l*) *Wells v. Fydell*, 10 East, 315.

(*q*) *Cottle v. Aldrich*, 4 Mau. & Sel.

(*m*) Com. Dig. Admor. C. 1. *Whitehall v. Squire*, Carth. 104. Off. Ex. 177. 5 Co. 31.

175.

(*r*) Supr. 38.

(*s*) *Mayor of Norwich v. Johnson*, 3 Lev. 35. Off. Ex. Suppl. 102.

(*n*) Off. Ex. 178.

(*t*) Off. Ex. 157.

(*o*) Off. Ex. 178.

(*p*) Com. Dig. Admor. C. 3. St. 384.

(*u*) *Dyer*, 166 b. note 11.

(1) *Howell's Adm. v. Smith*, 2 McCord's Rep. 517. On the death of a defendant in an action of debt, a summons may issue to an executor *de son tort* (there being no legal executor or administrator of the deceased) to appear and defend the action. Where an executor *de son tort*, being summoned, appeared to an action of debt brought against the deceased, and confessed the action, and admitted the debt was due to the plaintiff. An auditor was then appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c. according to the Act of 1798, *ch.* 101, *sub-ch.* 8. s. 9. The appointment of the auditor was afterwards stricken out by the Court, and a judgment rendered on the confession of the executor *de son tort*, for the debt and costs, *de bonis testatoris, si non de bonis propriis*, as to costs. Error being brought, the judgment was reversed. *Norfolk's Ex. v. Gantt*, 2 Harr. & Johns. 435.

(2) *Osborne v. Moss*, 7 Johns. Rep. 160.

(3) In force in *Pennsylvania*. 3 Binn. 624. *Roberts' Dig.* 258.

his own wrong is chargeable on a *devastavit* by his testator, in the same manner as such testator would have been if living (*w*).

But it seems that an executor *de son tort* of an executor *de son tort* is not liable for a *devastavit* committed by such first executor, either at common law, or by either of the two last mentioned statutes (*x*).

What has been stated in regard to actions against executors, is, in the main, applicable to administrators, whether general or limited. If an administrator *durante minoritate* continue in the pos- [475] session of the effects after the executor is come of age, he may be sued either by the executor or by a creditor (*y*). But if such administrator administer in part, and deliver to the executor, on his coming of age, all the residue, he cannot be charged by a stranger (*z*). If before the executor attain the age of twenty-one, the administrator wasted the assets, he may be charged on the special matter by the executor (*a*); but subsequent to that period, he is not liable for the *devastavit* at the suit of a creditor. The creditor must resort against the executor, who is entitled to his remedy against the administrator (*b*).

The executor of a deceased partner and the survivor cannot be jointly sued for a debt due from the partnership, because the former is to be charged *de bonis testatoris*, the latter *de bonis propriis* (*c*); but the creditor may proceed against either, who may claim from the other contribution. (1)

But if the executors of a deceased partner continue his share of the partnership property in trade for the benefit of his infant daughter, they are liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names are not added to the firm, but the trade is carried

(*w*) Vid. Com. Dig. Admon. I. 3. 174, 175.

(*x*) Com. Dig. Admon. I. 3. Andr. 252. 3 Bac. Abr. 100, in note.

(*a*) Latch. 160.

(*b*) 3 Bac. Abr. 14. Latch. 267. 1

(*y*) Com. Dig. Admon. F. 1 Sid. 57. 1 Anders. 34.

Anders. 34. 6 Co. 18 b.

(*c*) Hall v. Hufham, 2 Lev. 228.

(*z*) Brooking v. Jennings, 1 Mod.

(1) Where one of two or more joint contractors dies, subsequently to making the contract, the survivors alone continue responsible at law, the personal representatives of the deceased partner being discharged from liability. *Gow on Partnership*, 208. Am. edit. 1 Caines' Ca. 123. Kirby's Rep. 86, 87.

If the executor or administrator therefore be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue. *Gow, ibid. Burgwin v. Hostler's Adm.* Tayl. Rep. 124. S. C. 2 Hayw. Rep. 104.

In *Pennsylvania*, however, in order to reach the estate of a deceased partner, an action of *assumpsit* will be sustained against his executor, if the surviving partner be a certificated bankrupt before action brought; for there being no Court of Chancery in the state, a creditor could not come at the fund which in equity is bound for his debt, unless such action were sustained; and in such a case a plea in abatement would be ill, for the defendant could not, by such plea, give the plaintiff another person liable to suit. *Lang v. Kippick, Ex.* 1 Binn. 123.

on by the other partners under the same firm as before, and the executors, when they divide the profit and loss of the trade, carry the same to the account of the infant, and take no part of the profits themselves (*d*).

By the stat. 8 *Ann. c. 14. (e)*, a lessor is empowered to distrain within six calendar months after a lease for life, or for years, or at will, is determined, provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. In case a [476] lessee die before the expiration of a term, and his executor continue in possession during the remainder and after the expiration of it, a distress may be taken for rent due for the whole term (*f*).

An executor, it seems, is bound, provided he have assets, to maintain an apprentice till the term is expired; for a distinction exists between a covenant to maintain, and a covenant to instruct an apprentice: The former is a lien on the executor, although not named, in respect of the assets; the latter is a judiciary trust annexed to the person of the master (*g*). (1) But justices of the peace have, generally speaking, no authority to order an executor to maintain an apprentice, for such a jurisdiction would prevent his insisting by a plea of *plenè administravit* on a deficiency of assets as an exemption (*h*).

By the custom of London, it is said, the executor is bound to put the apprentice to another master of the same trade (*i*).

In respect to a parish apprentice, on whose binding no larger [477] sum than five pounds shall have been paid, some specific regulations are, in the event of the master's death, prescribed by the stat. 32 *Geo. 3. c. 57.* which enacts, that if the master of such an apprentice shall die during the term, the covenant in the indenture for his maintenance shall not continue in force longer than three calendar months after the death of such master, during which the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint: And in all such parish indentures of apprenticeship there shall be annexed to the covenant for maintenance a proviso, that such covenant shall not continue longer than three calendar months after the death of the master; but if such proviso be omitted, the covenant

(*d*) *Wightman v. Townroe and others*, 1 *Mau. & Sel.* 412.

(*e*) *Vid. Com. Dig. Distress, A. 2. 3 Bl. Com. 11.*

(*f*) *Braithwaite v. Cooksey et al.* 1 *H. Bl. Rep.* 465.

(*g*) *Com. Dig. Justices of Peace, B. 57. 4 Bac. Abr. 579. 1 Burn. Just. 82. 1 Const's Bott's P. L. 524. Pl.*

745. *Cro. Eliz.* 553. *Wadsworth v. Gye*, 1 *Sid.* 216. *Rex v. Peck*, 1 *Salk.* 66. *Baxter v. Burfield, Stra.* 1266. *Vid. supra*, 152. 285.

(*h*) *Pett v. Inhabitants of Wingfield, Carth.* 231. *Rex v. Pett, Show.* 405. 1 *Salk.* 66.

(*i*) *Per Holt, C. J. S. C.* 1 *Salk.* 66.

(1) See, however, *The Commonwealth v. King*, 4 *Serg. & Rawle*, 109; and the remarks of Ch. Justice *Tilghman* upon the cases contained in note (*g*).

on the part of the master to maintain the apprentice shall continue only for three calendar months after his death, within which period two justices of the peace where the master died shall, on the application of the widow of such master, or of any son, daughter, brother, or of any executor or administrator of the deceased, by indorsement on the indenture, direct the apprentice to serve another master for the remainder of his term. The statute also makes the same provisions for the death of any subsequent master. It then directs, that if no application be made to two justices within the three months, or if on application they shall not think fit to continue such apprenticeship, the indentures shall be void. It further provides, that the act shall not extend to any parish apprentice not living with or serving such original or subsequent master at the [478] time of his death. And lastly it enacts, that if the original or any subsequent master, or the personal representative of such master, having assets, during the three months shall refuse or neglect to maintain and provide for such apprentice according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master.

Executors and administrators are within the custom of foreign attachment; and, therefore, if a plaint be entered in the court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the city (*k*). But a debt due to the deceased cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased (*l*). (1) Nor shall there be an attachment for the debt of a testator of money or goods in the hands of the executor, unless they were due or belonging to the testator at the time of his death, although they be assets; as if an executor sell the goods of the testator, the money cannot be attached in his hands (*m*). Nor, if he take a bond for a debt due to the testator, can the money payable on the bond be attached (*n*). Nor if an executor recover damages in trespass for [479] the testator's goods, or on a covenant made with him, can there be an attachment of the damages (*o*). Nor, if money be awarded to an executor on a submission by him of controversies between his testator and another person, can the money due by the

(*k*) Com. Dig. Attachment, A. B. 3
Bac. Abr. 258. 1 Roll. Abr. 105. vid.
Dy. 196 b. Fisher v. Lane, 3 Wils. 297.
S. C. 2 Bl. Rep. 834.

(*l*) Com. Dig. Attachment, D. Hod-

ges v. Cox, Cro. Eliz. 843.

(*m*) Horsam v. Turget, 1 Ventr. 113.

(*n*) S. C. 1 Ventr. 113.

(*o*) Ibid. 112.

(1) In *Pennsylvania* a foreign attachment will not lie against executors. *McCombe v. Dunch*, *Pringle v. Black's Ex.* 2 Dall. Rep. 73, 97.

award be attached (*p*). Nor can there be an attachment of a legacy; for creditors have an interest in it, and they are incapable of being warned (*q*).

SECT. IV.

Of remedies against executors and administrators in equity.

AN executor or administrator is also, in his representative character, liable to all equitable demands, with regard to personal property, that existed against the deceased at the time of his death.

If, pending a suit, the defendant die, it shall be continued by bill of revivor against his executor (*a*).

Legatees, or persons in distribution, are also entitled to assert in a court of equity their claims against the executor or administrator, on the principle, that equity considers an executor as a trustee for the legatee in respect to his legacy, and as trustee in certain cases for the next of kin of the undisposed surplus (*b*). It also regards the administrator as trustee for the parties in distribution (*c*). And trusts are the peculiar objects of equitable cognizance. Thus a bill lies for a personal legacy; or for a discovery, and an account of assets; or for the distribution of an intestate's personal estate (*d*). And an administrator cannot avail himself of the length of time, as an answer to the plaintiff's bill for an account and application in payment of debts, where he has not pleaded or claimed the benefit of the statute of limitations (*e*). So it lies for the discovery of assets, merely for the purpose of enabling the plaintiff to maintain an action at law against an executor (*f*); but not till he has denied assets by his plea to the action (*g*).

An executor having admitted a large balance of personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. The plaintiff

(*p*) *Horsam v. Turgot*, 1 Vent. 112, 113. S. C. 1 Lev. 306.

(*q*) 1 Ch. Ca. 257. 1 Roll. Abr. 551. 3 Bac. Abr. 259. Noy. 115.

(*a*) Mitf. 63, 64.

(*b*) 4 Bac. Abr. 447. Anon. 1 Atk. 491. *Farrington v. Knightley*, 1 P. Wms. 544. *Wind v. Jekyl*, ib. 575. *Prac. Reg.* 2d edit. 209.

(*c*) 2 Fonbl. 322. *Matthews v. New-*

by, 1 Vern. 133, 134. 2 Ch. Ca. 95. Anon. 2 Vent. 362. 2 Ch. Rep. 167.

(*d*) 1 P. Wms. 287. 2 Fonbl. 321. note (*d*). *ibid.* 322. *Com. Dig. Chan.* 3 D. 1.

(*e*) *Cockshutt v. Pollard*, 1 Wils. 132.

(*f*) *Com. Dig. Chancery*, 2 G. 3.

(*g*) *Ibid.* 3 B. 2.

in the action did recover, and the court ordered the amount to be paid out to him, and not to the executor (*h*).

And where an executor admitted a balance due from him to his testator upon an unsettled account, notwithstanding he by his answer stated there were debts owing from the estate to which he was liable to the extent of assets, including that balance, the testator having died three years before, he was ordered to pay the balance into court, as all the debts ought to have been paid (*i*).

So where executors having personal estate of the testator given to them by the will, upon trust to lay out upon good and sufficient security, for an infant, to be paid on his coming of age, after a decree for an account and notice by the next friend of the infant plaintiff lending a part of such personal estate upon mortgage, they were ordered to pay the same into court; but the motion asking in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of the investment, was to that extent refused (*k*).

And an executor, by the schedule to his answer, acknowledging that he had received the testator's property, and lent it on a promissory note, was ordered to pay the money into court (*l*).

An executor may be also called upon in equity to account for interest he has made of the testator's estate (*m*). And he may be charged with interest upon balances, though not prayed by the bill (*n*).

And although the rule be not invariable, that an executor in all cases shall pay interest for money employed in the course of his trade; yet if, without any reasonable cause, he detain it for any length of time from the persons entitled, and apply it to the purposes of his trade, or even suffer it to lie idle in his hands, he [481] shall be subject to the payment of interest (*o*). (1)

Ordinarily, the court on a bill filed for a legacy of stock, does not inquire, whether the stock legacy could have been invested at an earlier period; but where the executor is a trustee also, and retains the legacy without investing it, he is liable for any loss, occasioned by the non-investment (*p*).

And if an executor is directed to invest money in the funds, or

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| (<i>h</i>) Yare v. Harrison, 2 Cox's Rep. 377. | kins v. Baynton, 1 Bro. Ch. Rep. 375. |
| (<i>i</i>) Mortlock v. Leathes, 2 Meriv. 491. | (<i>n</i>) Turner v. Turner, 1 Jac. and Walk. Rep. 39. |
| (<i>k</i>) Widdowson v. Duck, 2 Meriv. 494. | (<i>o</i>) Newton v. Bennet, 1 Bro. Ch. Rep. 359. Seers v. Hind, 1 Ves. jun. 294. Ashburnham v. Thompson, 13 Ves. 402. |
| (<i>l</i>) Vigrass v. Binfield, 3 Madd. Rep. 62. | (<i>p</i>) Byrchall v. Bradford, 6 Madd. Rep. 13. |
| (<i>m</i>) 11 Vin. Abr. 433. in note. | Per- |

(1) *Case of Flintham's Appeal*, 11 Serg. & Rawle, 16. *Scheiffelin v. Stewart*, 1 Johns. Cha. Rep. 620.

to lay it out upon mortgage at 5*L. per cent.* interest, and he has from time to time balances in his hands, and neglects to do so, inquiries will be directed at the original hearing concerning the balances retained by him, and the prices of the funds at the times when such balances were in his hands (*q*).

In respect to the rate of interest to which in such cases he shall be liable, if he make use of the money, he ought to pay the interest he has made. He ought not to derive any personal advantage from the trust property. If, therefore, it be established in evidence that he used the property in his trade, the court takes it for granted that the trade produced 5*L. per cent.* at the least, and it is incumbent upon him to shew that he made less. But in case of mere negligence to lay the money out for the benefit of the estate, although it be true that complete indemnity is not attained, unless the executor pay that interest which might have been made, yet that is not the principle on which the court acts. It has laid down a rule in regard to the quantum of interest, namely 4 *per cent.*, from which it does not depart without some special reason. And mere negligence is not sufficient to produce an exception: Consequently, if there be no evidence of the executor's having employed the fund, but mere neglect to pay it, he cannot be charged with more than 4 *per cent.* interest. And even when an executor mixed the fund with his own money at his banker's, the benefit derived by him not appearing, Lord Thurlow, C. held him chargeable only with interest at 4 *per cent.*: Although Lord Loughborough, C. was of opinion, in which Sir William Grant, M. R. in a late case appeared to concur, that if a trader lodge money at his banker's it answers the purpose of his credit, and it should be held to be an employment in his trade (*r*). And Sir John Leach, V. C. in a subsequent case, charged an executor with interest at 5 *per cent.* who mixed his testator's money at his banker's with his own, receiving only an interest of 3½ *per cent.* instead of laying it out for the benefit of the parties entitled (*s*). But although the court does not usually charge an executor with a greater rate of interest than 4 *per cent.* where he has called in the money for purposes of the will, yet if it were outstanding on good security, at the time of the testator's death, at 5 *per cent.* and he call it in without any purpose connected with the trust, and hold the whole in his hands without attempting to lay it out, he shall be charged with interest at the rate of 5 *per cent.*, on the ground of a general dereliction of duty on his part; and though a small part of the money so called in carried only 1½ *per cent.* that will make no difference in his favour (*t*).

(*q*) Hockley v. Bantock, 1 Russ. Rep. 144.

(*r*) Roake v. Hart, 11 Ves. jun. 58.
Sutton v. Sharpe, 1 Russ. Rep. 146.

(*s*) Harris v. Docura, April 1818. MS.

(*t*) Morley v. Ward, 11 Ves. jun. 581.
Crackelt v. Bethune, 1 Jac. & Walk. Rep. 686.

But if a will direct the executor to lend at the best interest a sum of money, which at the time of the testator's death is outstanding at four *per cent.*, and the executor suffer it to continue so, he shall be personally liable to pay five (*u*). And so if executors be directed to lay out the residue in the purchase of land, or upon heritable or personal securities, at such rate of interest as they should think reasonable, and they lend the fund to one of themselves on bond at 4 *per cent.*, when 5 *per cent.* might have been made by heritable or government securities; the executor borrowing shall pay 5 *per cent.*; for in contracting with himself he cannot spare himself (*v*). If there be an express trust to make improvement of the testator's estate, and the executor will not honestly endeavour to improve it, he shall be considered as having lent the money to himself on the same terms on which he would have lent it to others; and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest; and consequently he shall be charged with interest upon interest: but in general the account shall not be taken against him from the moment of the testator's death upon all sums received and paid by him, but some time is fixed, at which the principal is said to be in his hands, so as that it was capable of being laid out; and he is then to be first charged with the principal and with subsequent interest, and for that purpose annual rests in the taking of such accounts are most usual. But where a testator gave a legacy to his executor in full for his trouble in executing the will, and declared that he should have no commission, nor derive any advantage from keeping any money in his hands without duly accounting for the legal interest thereof; and after providing for the maintenance and education of his children out of the interest of their respective portions, directed that the surplus interest should accumulate for their benefit, and be laid out on the public funds for that purpose; and the executor kept the fund in his hands for a long period of time, without attempting any accumulation; he was held liable to interest at 5 *per cent.* on all the sums of money which came to his hands, from the time he received them respectively so long as they continued in his hands: and in taking the accounts the master was ordered to make half-yearly rests, for the purpose of charging him with compound interest, (that is to say) by stating the whole amount of the interest which had accrued at the end of each half-year, and adding that to the principal of the next half-year (*w*).

Nor, in case the executor be expressly directed to improve the estate, shall he be permitted to redeem himself by accounting upon the supposition of the money having been laid out in the public funds, if in point of fact it were not so laid out; or if he laid out

(*u*) *Forbes v. Ross*, 2 Bro. Ch. Rep. 429.

(*v*) *Forbes v. Ross*, 2 Cox's Rep. 111.

(*w*) *Raphael v. Boehm*, 11 Ves. jun. 92. and 13 Ves. jun. 197.

the property in the public funds, and then sold out the stock at a great advance, if at the close of the trust the price be less than he sold at, it is not sufficient for him to offer back the stock, but he shall answer for the amount of the money for which he sold it out (*q*). Upon the same principles, in case of the bankruptcy of an executor having failed to comply with a direction in the will to accumulate the interest, his estate shall be charged with interest at the rate of 5 *per cent.* with rests (*r*). But an executor shall not be charged with interest on a balance in his hands, which he retained under a misapprehension, for which there was some colour, of his having a right to it (*s*).

Nor, if an executor compound debts due from the testator, or buy them in for less than their amount, shall he be personally entitled to the benefit of the composition : but other creditors, or the legatees, or the party entitled to the surplus, shall have the advantage of it (*t*). (1)

Yet if an executor lend money on real security, which at that time there was no reason to suspect, and afterwards such security prove bad, he shall not be accountable for the loss, any more than he would have been entitled to the produce of it if it had been sufficient (*u*). So where A. an executor, paid the assets into the hands of B., his co-executor, with whom the testator was used to keep cash as his banker; on the failure of B., the court held, that A. ought not to suffer for having trusted him, whom the testator trusted in his lifetime, and at his death appointed one of his executors (*w*).

So, although, generally speaking, if an executor compound or [482] release a debt to the testator, he shall answer for the amount; still, if he appear to have acted for the benefit of the estate, he shall not be charged (*x*). (2)

Formerly an executor could not be compelled of course to secure a future legacy, on the principle that where the testator had thought fit to repose a trust, unless some breach of it were shewn, or a tendency to a breach, the court would continue to confide in the same hand; for such a purpose it was necessary to shew misconduct on the part of the executor, or his insolvency (*y*): Or, in the case of an executrix, that she had married a person in needy.

(*q*) Ibid. 108.

(*r*) Dorford v. Dorford, 12 Ves. jun. 127.

(*s*) Bruere v. Pemberton, 12 Ves. jun. 386.

(*t*) 11 Vin. Abr. 433. Anon. 1 Salk. 155. pl. 4.

(*u*) Brown v. Litton, 1 P. Wms. 141.

4 Burn. Eccl. L. 428. Supr. 428.

(*w*) 4 Burn. Eccl. L. 428. Churchill v. Lady Hobson, 1 P. Wms. 243.

(*x*) 11 Vin. Abr. 432. Blue v. Marshall, 3 P. Wms. 381. Vid. supr. 429.

(*y*) Slanning v. Style, 3 P. Wms. 336. 11 Vin. Abr. 426, 427, 428, 432.

3 Bac. Abr. 8. 1 Atk. 505. 3 Atk. 101.

(1) *Case of Henger's Executors*, 15 Serg. & Rawle, 65.

(2) *Pusey v. Clemon*, 9 Serg. & Rawle, 201.

circumstances (*z*). But, according to the present practice, where a legacy is payable at a future period, the legatee, without any suggestion of an abuse of the trust, or that the fund is in danger, has a right to call upon the executor to have it divided from the bulk of the estate, and secured and appropriated for his benefit, as well where it is contingent, as where it is vested (*a*). Annuity-takers are likewise entitled to the same equity, and to compel the executor to set apart a sufficient fund for the regular payment of their annuities (*b*).

[483] An executor is in general personally bound by an admission of assets express, or implied, as by the payment of interest: but in either case he may be let in to shew, why it should not charge him, as that the money was deposited in the hands of bankers, who have failed; or that his admission was grounded on a mistake (*c*). Such admission is also waived by the plaintiff's proceeding to an account of assets, and procuring a receiver to be appointed (*d*).

In case an executor be decreed to pay interest on account of a breach of trust, or because he has neglected to lay money out for the benefit of the estate (*e*), he is liable to costs of course (*f*). If an executor have acted fraudulently, the court will decree costs against him (*g*), although the will direct that his expenses shall be allowed out of the testator's estate (*h*). He is also subject to costs in equity as well as at law, if he has misconducted himself by paying simple contract debts in preference to bond-creditors (*i*).

But an executor shall have his costs, although he make a claim, and fail, if it were merely a submission of the point for the opinion of the court (*k*).

[484] If two executors or administrators join in a receipt, one only of whom receives the money, equity has been stated to adopt this distinction, that in such case, each is liable for the whole (*l*) as to creditors, who are entitled to the full benefit of law, although one of such personal representatives might have given an effectual discharge; but that with respect to legatees, or parties claiming distribution, as they have no legal remedy, one executor or administrator shall not be charged merely by joining in the receipt,

(*z*) *Rous v. Noble*, 2 Vern. 249.

(*a*) 4 Bac. Abr. 448. *Green v. Pigot*, 1 Bro. Ch. Rep. 103. *Cooper v. Douglas*, 2 Bro. Ch. Rep. 232. *Strange v. Harris*, 3 Bro. Ch. Rep. 365. *Ferrand v. Prentice*, Amb. 273. *Prac. Reg.* 2d edit. 270.

(*b*) *Slanning v. Style*, 3 P. Wms. 335.

(*c*) *Horsley v. Chaloner*, 2 Vez. 85.

(*d*) *Wall v. Bushby*, 1 Bro. Ch. Rep. 484.

(*e*) *Newton v. Bennett*, 1 Bro. 11.

362. *Rocke v. Hart*, 11 Ves. jun. 58.

(*f*) *Prac. Reg.* 2d edit. 210. *Seers v. Hind*, 1 Ves. jun. 294. *Sed vide Ashburnham v. Thompson*, 13 Ves. 402.

(*g*) *Reech v. Kinnegal*, 1 Vez. 126. *Horsley v. Chaloner*, 2 Vez. 85.

(*h*) *Prac. Reg.* 2d edit. 150, 151. *Hathornthwaite v. Russel*, 2 Atk. 126.

(*i*) *Jeffries v. Harrison*, 1 Atk. 468.

(*k*) *Prac. Reg.* 2d edit. 152. *Rashley v. Masters*, 1 Ves. jun. 295.

(*l*) 2 Bac. Abr. 31.

when the other has received the money; for that the addition of his name is only matter of form, the substantial part is the act of receiving, and is alone regarded in conscience (*m*). (1) But this distinction between legatees or parties in distribution, and creditors, appears to rest on no authority (*n*). The rule is general, that executors, joining in a receipt, shall all be answerable (*o*). It has, indeed, in some instances been broken in upon (*p*), and Sir Richard P. Arden, M. R. denied it to be universally applicable (*q*). It seems an exception, if an executor receive the money without the consent of his co-executor, and they *afterwards* sign the receipt (*r*), [485] for by that act they did not enable him to obtain the payment. So if one executor places the property in the hands of the other, who happens to be a banker, or in such a situation that the act is not improvident; he shall not be charged in case of a loss, for if he had been a sole executor, and had under the same circumstances deposited the money with a banker, he would not have been liable (*s*).

This, however, is clear from all the cases, that, where by any act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had enabled to receive it (*t*). Therefore where executors joined in a transfer of stock to a co-executor, upon a representation that it was required for debts, and he wasted part of the produce, they were charged with the whole, that they could not prove the application of to that purpose (*u*).

Co-trustees are in this respect contradistinguished from co-executors. In the case of co-trustees, as each hath not a power over the whole of the fund, their joining in a receipt is necessary, and, consequently, although they join in such receipt, yet it is a general rule that the trustee who receives the money shall be alone chargeable. But in the case of co-executors, each has a power over the

(*m*) Churchill v. Hopson, 1 Salk. 318. S. C. 1 P. Wms. 241. 1 Eq. Ca. Abr. 398. Murrell v. Cox, 2 Vern. 570.

(*n*) Sadler v. Hobbs, 2 Bro. Ch. Rep. 117. 1 P. Wms. 243. in note. 3 Bac. Abr. 31. in note.

(*o*) Fellowes v. Mitchell, 1 P. Wms. 81. Aplyn v. Brewer, Prec. Ch. 173. Leigh v. Barry, 3 Atk. 584. Ex parte Belchier, Ambl. 219. Sadler v. Hobbs, 2 Bro. Ch. Rep. 116.

(*p*) Churchill v. Hopson, 1 Salk. 318. S. C. 1 P. Wms. 241. 1 P. Wms. 83. note (1).

(*q*) Scurfield v. Howes, 3 Bro. Ch. Rep. 94.

(*r*) 1 P. Wms. 241. note 1. 83. note 1. Read v. Truelove, Ambl. 417. Sadler v. Hobbs, 2 Bro. Ch. Rep. 114. Scurfield v. Howes, 3 Bro. Ch. Rep. 90. Hovey v. Blakeman, 4 Ves. jun. 596. Westley v. Clarke, 1 Eden's Rep. 357.

(*s*) Chambers v. Minchin, 7 Ves. jun. 197, 198.

(*t*) 1 P. Wms. 241, note 1. 3 Bro. Ch. Rep. 97. Doyle v. Blake, 2 Scho. & Lef. 231.

(*u*) Lord Shipbrook v. Lord Hinclinbrook, 16 Ves. jun. 477. Underwood v. Stevens, 1 Meri. Rep. 713.

(1) *Acc. Appeal of Brown, Ex. of Edgar*, 1 Dall. Rep. 311.

fund, and a co-executor joining in a receipt is altogether unnecessary; therefore, if he act without necessity, and join with his co-executor in such receipt, he shall in general be responsible for the consequences: He assumes a power over the property, and it shall [186] not be afterwards permitted to him to say, that he had no controul over it (*x*). So, if executors confiding in the representation of their co-executor, that stock standing in the testator's name is wanting for the payment of debts, do join in a transfer of the stock to him, if he misapply the whole or any part of it, they are chargeable with him to the extent of such misapplication (*y*). In like manner, if an executor has been dealing with the assets much beyond that period of time, in which, in the ordinary course, debts would be paid, and he applies to his co-executors to have such fund transferred to him alone, and on enquiring, they satisfy themselves, that there are debts unpaid, and his real purpose were to apply the fund in discharge of such debts, if it afterwards appear, that he had in his hands another fund sufficient for the payment of those debts, and such application of the fund was not necessary, nor was it in fact devoted to the payment of debts, they shall be responsible. They are, in such case, subject to the imputation of negligence in being too easy with their co-executor; too remiss in not enquiring how for so long a time, he had been acting in the administration of the assets (*z*).

But within a reasonable time, if executors, after the testator's death, join in a transfer of stock to their co-executor, on his representation, that it is requisite for the payment of debts: they are not responsible if they can prove he applied it to that purpose, although he had possessed, if not by their means, other part of the assets which he had wasted (*a*). And though it be a settled rule, that if an executor contribute in any way to enable the other to obtain possession of the assets, he shall be answerable for their misapplication; yet the rule does not extend to those cases, in which an executor is merely passive, and does not obstruct the other in receiving the property, for it is not incumbent upon one executor by force to prevent its getting into the hands of his co-executor (*b*).

So a co-executor, who proved, but never acted, having received a bill by the post on account of the estate, and transmitted it immediately to the acting executor, was held not to be responsible for the administration of the property (*c*). So if A. interested in the fund act in authorising B. one executor to part with it to

(*x*) *Chambers v. Minchin*, 7 Ves. jun. 186. *Brice v. Stokes*, 11 Ves. jun. 323, 324. *chinbrook*, 11 Ves. jun. 254.

(*a*) *Ibid.* 254.

(*y*) *Lord Shipbrook v. Lord Hin-* *jun. 383.*
chinbrook, 11 Ves. jun. 252. 16 Ves. 478.

(*c*) *Balchen v. Scott*, 2 Ves. jun. 678.

(*z*) *Lord Shipbrook v. Lord Hin-*

C. his co-executor, and it be wasted, B. shall not be responsible to the extent of A.'s interest : But B. shall be responsible to the other parties, who may be interested in the fund, in case they did not acquiesce in his transferring it to C. (*d*).

Although one executor admit assets, an account shall be decreed against his co-executor, who does not admit them (*e*). And where an infant legatee filed a bill for an account against two executors, although one of them in his answer denied having either proved the will, or received any assets, the account was directed against both (*f*).

If an executor under the express authority of the will carry on trade with the testator's general assets, not only such assets, but even his own property will be subject to his bankruptcy.

If the trade be beneficial, the profits are applicable to the purposes of the will, and the executor derives no personal benefit from the success of the trade. If the trade prove a losing concern, the executor, on a failure of the assets, will be personally liable to the loss.

[487] If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy ; (1) the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests : And with respect to such of the assets as can be specifically distinguished to be part of the testator's estate, they will not pass by the assignment of the commissioners ; the executor holding them *alieno jure*, they will not be liable to his bankruptcy (*g*).

But the testator may by his will qualify the power of his executor to carry on trade, and may limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose ; and then, in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation (*h*).

If the executor of a trader only dispose of the stock in trade, it will not make him a trader, or subject to a commission of bankruptcy. Thus, where the executor of a wine-cooper found it ne-

(*d*) Brice v. Stokes, 11 Ves. jun. 319.

(*e*) Com. Dig. Chancery (2 G. 3.) Norton v. Turville, 2 P. Wms. 145.

Wall v. Bushby, 1 Bro. Ch. Rep. 488.

(*f*) Price v. Vaughan, 2 Anstr. Rep. 524.

(*g*) See Ex parte Garland, 10 Ves. jun. 110. Supr. 166. & Cooke's B. L. 4th edit. 67. and Whitmarsh's B. L. 2nd edit. 268.

(*h*) Ex parte Garland, 10 Ves. jun. 110.

(1) Nor to any loss occasioned by such unauthorized trading. *Hull v. Callaghan's Adm.* 1 Serg. & Rawle, 241.

[488] cessary to buy wines to refine the stock left by the testator, this was held not to constitute him a trader (*i*).

If an executor become a bankrupt, his bankruptcy does not divest him of his legal right of executorship, nor does the commissioner's assignment affect the assets, except in regard to such beneficial interest, as the bankrupt himself may be entitled to. But, although a bankrupt executor may strictly be the proper hand to receive the assets, if his assignees be possessed of any part of the property, the Court of Chancery will, for the benefit of creditors and legatees, appoint a receiver for the same; or will direct the bankrupt himself to be admitted a creditor for what he shall be indebted to the estate; nor is this practice incongruous, as he acts in *auter droit*. Yet to prevent embezzlement, the court, on such proof, will order the dividends to be paid into the Bank, subject to the demands on the testator's estate (*k*). So where A. a bankrupt, and also B. claimed to be executors of a creditor of A. and a suit was pending in the ecclesiastical court in regard to the executorship; the Lord Chancellor permitted B. to prove the debt un- [489] der the commission, and directed the dividends to be paid into the Bank, to abide the event of the litigation (*l*). And where an executor, in consequence of his bankruptcy becomes destitute, and incapable of exercising his functions, and elects to relinquish his interest in the testator's property, the Court of Chancery will permit a creditor of the testator to file a bill for himself, and to call in the outstanding assets for the purpose of administering them (*m*). And a receiver has been appointed before answer upon an affidavit of misapplication and danger to the property in the hands of an executor, and the co-executor's consenting to the order (*n*).

An executor being out of the jurisdiction in Scotland, a receiver was appointed under the 36 *Geo. 3. c. 90.* but administration having been granted, a motion was made on the part of the administrator for an injunction to restrain the receiver from acting. The Lord Chancellor referred it to the master to reconsider the appointment of a receiver, regard being had to the circumstance of administration having been granted (*o*).

A writ of *ne exeat regno* against a feme covert administratrix, cannot be sustained (*p*).

(*i*) Cooke's B. L. 4th edit. 67. and Whitmarsh's B. L. 2nd edit. 16.

(*k*) Cooke's B. L. 133, 134, 135. 137. Stone, 131. Ex parte Ellis, 1 Atk. 101. Ex parte Butler, ib. 213. Butler v. Richardson, Ambl. 74. Ex parte Markland, 2 P. Wms. 546. Ex parte Leek, 2 Bro. Ch. Rep. 596. Vid. also supr. 429. and Whitmarsh's B. L. 2nd edit. 269.

(*l*) Ex parte Shakeshaft, 3 Bro. Ch. Rep. 198.

(*m*) Burroughs v. Elton, 11 Ves. jun. 29.

(*n*) Middleton v. Dodswell, 13 Ves. 266.

(*o*) Faith v. Dunbar, Coop. Rep. 200.

(*p*) Pannel v. Tayler, 1 Turn. 96.

SECT. V.

Of remedies against executors and administrators in the Ecclesiastical Court.

LEGATEES, and the next of kin may proceed against the executor or administrator in the ecclesiastical court. That court has not only jurisdiction over the probate of wills, and the granting of administrations, but has also, as incident to the same, authority to enforce the payment of legacies (*a*); and, according to the statute, the distribution of an intestate's effects. (1) In respect to legacies, the cognizance of them in former times belonged exclusively to that judicature. The Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*b*). In regard also to distribution, equity, as the act of parliament contains no negative words, has a concurrent jurisdiction with the ordinary, and in both cases as being armed with [490] larger powers, affords a more effectual relief (*c*).

As a court of equity, and the spiritual court have in these points a concurrent jurisdiction, whichever of them has first possession of the cause has a right to proceed (*d*). But where it appears that the ordinary cannot administer complete justice, equity, without regard to such priority, will interpose. As, where a husband sues in the spiritual court for a legacy bequeathed to the wife, the Court of Chancery will grant an injunction to stay the proceedings, since the ecclesiastical judge has no authority to compel a settlement (*e*). So a legacy given to an infant is more properly cognizable in equity, since that jurisdiction can alone secure the money for the child's benefit (*f*).

The spiritual jurisdiction extends to legacies only of personal property; therefore, if land be devised to be sold for the payment of

(*a*) 4 Bac. Abr. 446. 3 Bl. Com. 98.

(*b*) Deeks v. Strutt, 5 Term Rep. 692. See 1 P. Wms. 575.

(*c*) Vid. 2 Fonbl. 2d edit. 414, note (d.) Matthews v. Newby, 1 Vern. 134.

(*d*) 4 Bac. 447. Toth. 114. Nicholas v. Nicholas, Prec. Ch. 548.

(*e*) Hill v. Turner, 1 Atk. 516.

Jewson v. Moulson, 2 Atk. 420. Ni-

cholas v. Nicholas, Prec. Chan. 548.

2 Ves. jun. 676. Meales v. Meales, 5

Ves. jun. 517, in note. See also 10

Ves. jun. 577. & supr. 321.

(*f*) Howell v. Waldron, 1 Vern.

26. Anon. 1 Atk. 491.

(1) See an instance in which Gov. Bull (of South Carolina), in the year 1765, in his character of ordinary, summoned an administrator, at the instance of the guardians of the intestate's children, to account for his administration, and upon his non-compliance, passed sentence of the greater excommunication against him. *Grimké on Executors*, preface, page vii.

legacies, they can be sued for only in a court of equity, because they arise out of the real estate (*g*). Equity has also the exclusive cognizance of those cases in which there is a will, and the [491] residue is undisposed of; for then as we have seen (*h*), the executor is a trustee for the residue, and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust (*i*). Nor has he a power to compel the debtor of an intestate to pay his debt into court, although such debtor be the person applying for a distribution, for that would be to hold a plea of debt; but in that case he may refuse to proceed to a distribution till the party shall bring it in (*k*). So, it seems, that if a legatee take a bond from the executor for payment of the legacy, and afterwards sue him in the spiritual court for the same, a prohibition will be granted; for by taking the obligation the nature of the demand is changed, and becomes a debt recoverable in the temporal courts (*l*).

In case a legatee, or the next of kin elect to sue in the spiritual court, the executor or administrator must there exhibit an inventory of the property, if he has not done so before, and bring in an account (*m*).

Of the nature of an inventory I have already treated (*n*). It is to contain a full, true, and perfect schedule of the deceased's effects. [492] The account is to state in what manner they have been disposed of (*o*).

Neither an executor nor an administrator can be cited by the ordinary *ex officio* to account (*p*). The executor, we have seen, is bound by his oath to make an inventory of the personal estate, and exhibit the same into the registry of the spiritual court at the time assigned him for that purpose, and render a just account, when lawfully required, that is to say, at the suit of a legatee; and in such case he is bound not only to produce an account, but also to prove the different items of it (*q*).

The payment of sums under forty shillings shall be proved merely by his oath, if there appear no fraud by dividing greater sums into less. Of the payment of sums to a higher amount vouchers

(*g*) 4 Bac. Abr. 446. Dyer, 151. Palm. 120. Cro. Jac. 279, 364. Cro. Car. 16. 2 Roll. Abr. 285. Bastard v. Stockwell, 2 Show. 50.

(*h*) Supr. 351, 479.

(*i*) 2 Fonbl. 2d edit. 414, note (d) ad fin. Petit v. Smith, 5 Mod. 247. Hatton v. Hatton, Stra. 865. Petit v. Smith, Ld. Raym. 86. Rex v. Ruines, ib. 363. Farrington v. Knightly, 1 P. Wms. 546, 547, 549.

(*k*) Clerke v. Clerke, Ld. Raym. 585.

(*l*) Goodwyn v. Goodwyn, Yelv. 38.

Luke v. Alderne, 2 Vern. 31. Sed Dodderidge, J. contr. 2 Roll. Rep. 160. vid. Sadler v. Daniel, 10 Mod. 21.

(*m*) 4 Burn. Eccl. L. 425.

(*n*) Vid. supr. 247. et seq.

(*o*) Greerside v. Benson, 3 Atk. 252.

(*p*) Com. Dig. Admon. C. 3. Archbp. of Canterbury v. Wills, 1 Salk. 315, 316. Greerside v. Benson, 3 Atk. 253.

(*q*) Archbp. of Canterbury v. Wills, 1 Salk. 316. vid. also Archbp. of Canterbury v. House, Cowp. 111.

must also be exhibited (*r*). The adverse party shall be at liberty to disprove such account. If it be false, the executor shall be liable to the penalties of perjury (*s*).

After the death of an executor sums under forty shillings shall not be allowed on the oath of his representative ; for such payments can be substantiated only by him who made them (*t*).

[493] In regard to the administrator, before the statute of distribution, according to the condition of the administration bond, he also was bound to exhibit an inventory and render an account when required. But pursuant to that statute the administrator, we may remember, enters into a bond with two or more sureties, conditioned for his exhibiting an inventory of the effects, and an account of the same, at the respective times specified. Therefore, without citation or suit, he ought, in strictness, to appear on the day, and produce his account in court. But, in that case, it is neither verified by oath, nor liable to be examined. If, however, a party in distribution, who is in the nature of legatee by statute, and therefore entitled to an account, shall come in and controvert it ; it must be sworn to, and is subject to investigation ; when the proceedings shall be the same as in the case of an executor (*u*).

Thus it appears that the stat. 1 Jac. 2. c. 17. (*w*), which provides that no administrator shall be cited according to the statute of distributions to render an account of the personal estate of his intestate otherwise than by inventory, unless at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate, as a creditor, or next of kin, nor be compellable to account before the ordinary ; had, in truth, no operation, as such was the law before (*x*).

[494] All the legatees, or parties in distribution are to be cited to appear at the making of the account ; for it shall not be conclusive on such as shall be absent, and have not been cited (*y*). An executor or administrator, therefore, when he is called upon by any one party to account, should cite the legatees, or next of kin in special, and all others in general, having, or pretending to have, an interest, to be present, if they think fit, at the passing of the same ; and then, on their appearance, or contumacy in not appearing, the judge shall proceed (*z*).

Although the spiritual court have, as incident to the jurisdiction of wills, the jurisdiction also of legacies ; yet, if a temporal matter be pleaded in bar of an ecclesiastical claim, they must proceed ac-

(*r*) 4 Burn. Eccl. L. 427. Ought. 347, 348.

(*s*) 4 Burn. Eccl. L. 427. Ought. 346.

(*t*) 4 Burn. Eccl. L. 427. Ought. 347.

(*u*) Archbp. of Canterbury v. Wills, 1 Salk. 313, 316.

(*w*) Vid. 4 Burn. Eccl. L. 426.

(*x*) Archbp. of Canterbury v. Wills, Salk. 315, 316.

(*y*) 4 Burn. Eccl. L. 426. Swinb. p. 6, s. 20.

(*z*) 4 Burn. Eccl. L. 426. Ought. 354, 355, 356.

cording to the common law (*a*). Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, whom the ecclesiastical court will not admit, because their law requires two witnesses, a prohibition shall issue (*b*). But it is not a sufficient ground for a prohibition to suggest, that the plaintiff had only one witness to prove the fact, unless the party allege he offered such proof, and it was refused for insufficiency (*c*).

If the spiritual court shall attempt a distribution contrary to the rules of the common law, it shall be prevented by a prohibition, because it is restricted by the statute of distribution to those rules (*d*).

[495] After the investigation of the account, if the ordinary find it true and perfect, he shall pronounce for its validity. And in case all parties interested as above mentioned have been cited, such sentence shall be final, and the executor or administrator shall be subject to no farther suit (*e*).

In case there shall appear assets for the entire, or partial payment of the legacy, or for a distribution, the same shall be decreed accordingly.

An executor or administrator is also bound to exhibit an account upon oath, at the promotion of a creditor; but a creditor is not permitted to call for vouchers, nor to offer any objections to the account; in respect to him the oath of the party is at once conclusive: for such litigation would be altogether fruitless, since the spiritual court has no authority to award the payment of a debt (*f*).

The object of a creditor in suing for an account in the spiritual court is to gain some insight into the state of the fund, previously to his proceeding in an action at common law; but a bill in equity for a discovery of the assets is the more usual, as it is the more effectual remedy (*g*).

Yet a creditor, as well as the next of kin, has a right *ex debito* [496] *justitiæ*, to an assignment by the ordinary of the administration bond, and to sue in the name of the ordinary, as well the sureties as the principal, shewing for breach the administrator's not exhibiting a true inventory, or account (*h*). But a creditor has no right in such case to assign for breach the non-payment of his debt, or a *devastavit*, for the words of the condition, "he is well and truly to administer," are construed to apply merely to the bringing

(*a*) 4 Bac. Abr. 447. 1 Roll. Abr. 298, 299. Hob. 12. 12 Co. 65. Hethley, 87. 2 Inst. 608. Sid. 161.

(*b*) Bagnall v. Stokes, Cro. Eliz. 88. 666. Shatter v. Friend, Show. 158. 173. Richardson v. Disborow, Vent. 291. Shatter v. Friend, 3 Mod. 283. Breedon v. Gill, 1 Ld. Raym. 220. Cook v. Licence, 346. Startup v. Dodderidge, 2 Ld. Raym. 1161. 1172. 1211. Shatter v. Friend, 2 Salk. 517. S. C. Carth. 142. Blackborough v.

Davis, 1 P. Wms. 47, 49.

(*c*) Carth. 143, 144.

(*d*) Blackborough v. Davis, 1 P. Wms. 49.

(*e*) 4 Burn. Eccl. L. 428. Swinb. p. 6. s. 21.

(*f*) Vid. Noy. 78.

(*g*) Vid. supr. 479, 489, 490.

(*h*) Greerside v. Benson, 3 Atk. 248. Archbp. of Canterbury v. House, Cowp. 140. Vid. 2 Fonbl. 414. 2d edit. note (*d*).

in of a true inventory, and account, and not the payment of the intestate's debts (*i*).

An executor or administrator shall be allowed in the spiritual court all his reasonable expences, the rule in respect to which is, that he shall receive no profit, nor incur any loss (*k*). A party, having an interest, who prays an account, shall not be condemned to costs, unless he make objections to it, which he fails to substantiate (*l*).

A legacy may be recovered in the spiritual court against an executor of his own wrong (*m*).

Legatees may file a bill in chancery for an account against the executor, and at the same time, call upon him in the prerogative court to exhibit an inventory (*n*).

[497] So where a suit is pending in the ecclesiastical court in regard to the probate of a will, or right of administration, a bill in chancery will lie by a party interested for an account of the personal estate, on the ground, that the ecclesiastical court has no means of securing the effects in the interim (*o*). And the court will protect the property by appointing a receiver (*p*).

The ecclesiastical court cannot entertain a suit for proctors' fees, since they are a temporal duty, for which an action may be maintained in the temporal courts (*q*).

(*i*) 4 Burn. Eccl. L. 428. 430. Lutw. 49. Phipps v. Steward, 1 Atk. 285, 882. Archbp. of Canterbury v. Wills, 2 Bro. P. C. 476. Morgan v. Harris, 1 Salk. 315, 316. Com. Dig. Admon. 2 Bro. Ch. Rep. 121.
C. 3.

(*k*) 4 Burn. Eccl. L. 428. Lind. 178.

(*l*) 4 Burn. Eccl. L. 428. Floy. 38.

(*m*) 4 Bac. Abr. 448. 1 Roll. Abr. 919.

(*n*) 11 Vin. Abr. 427. 3 Chan. Rep. 72.

(*o*) Wright v. Bluck, 1 Vern. 106. Dulwich College v. Johnson, 2 Vern.

(*p*) Atkinson v. Henshaw, 2 Ves. and Bea. 85. Ball v. Oliver, ib. 96.

(*q*) 2 Burn. Eccl. L. 239. Com. Dig. Prohibition (F. 5.) Pollard v. Gerrard, Ld. Raym. 703. S. C. 1 Salk. 333, Horton v. Wilson, 1 Mod. 167. Johnson v. Lee, 5 Mod. 238. Skin. 589. Bunb. 70. Pitts v. Evans, 2 Stra. 1108. Dougl. 629.

APPENDIX

OF

STAMP DUTIES.

By the Statute 55 Geo. 3. c. 184. the Stamp Duties imposed by the 48 Geo. 3. c. 149. the 44 Geo. 3. c. 98. and the 45 Geo. 3. c. 28. are repealed, and the following Stamp Duties are imposed:

	Duty.
PROBATE of a Will, and Letters of Administration with a Will annexed, to be granted in <i>England</i> :	<hr style="width: 100%; border: none; border-top: 1px solid black;"/>
	<i>L. s. d.</i>
CONFIRMATION of any Testament testamentary, or Eik thereto, to be expedited in any Commissary Court in <i>Scotland</i> , where the Deceased shall have died before or upon the 10th Day of October 1808, and subsequent to the 10th Day of October 1804;	
INVENTORY to be exhibited and recorded in any Commissary Court in <i>Scotland</i> , of the Estate and Effects of any Person deceased, who shall have died after the 10th Day of October 1808, and have left any Testament or testamentary Disposition of his or her Personal or Moveable Estate and Effects, or any Part thereof;	

INVENTORY—*continued.*

Duty.

Where the Estate and Effects for or in respect of which such Probate, Letters of Admin- istration, Confirmation or Eik respect- ively, shall be granted or expedied, or whereof such inventory shall be exhibited and recorded, <i>exclusive of what the De- ceased shall have been possessed of or en- titled to as a Trustee for any other Person or Persons, and not beneficially,</i> shall be					<i>L. s. d.</i>		
above the Value of 20l. and under the Value of 100l.	-	-	-	-	0	10	0
of the Value of 100l. and under the Value of 200l.	-	-	-	-	2	0	0
of the Value of 200l. and under the Value of 300l.	-	-	-	-	5	0	0
of the Value of 300l. and under the Value of 450l.	-	-	-	-	8	0	0
of the Value of 450l. and under the Value of 600l.	-	-	-	-	11	0	0
of the Value of 600l. and under the Value of 800l.	-	-	-	-	15	0	0
of the Value of 800l. and under the Value of 1,000l.	-	-	-	-	22	0	0
of the Value of 1,000l. and under the Value of 1,500l.	-	-	-	-	30	0	0
of the Value of 1,500l. and under the Value of 2,000l.	-	-	-	-	40	0	0
of the Value of 2,000l. and under the Value of 3,000l.	-	-	-	-	50	0	0
of the Value of 3,000l. and under the Value of 4,000l.	-	-	-	-	60	0	0
of the Value of 4,000l. and under the Value of 5,000l.	-	-	-	-	80	0	0
of the Value of 5,000l. and under the Value of 6,000l.	-	-	-	-	100	0	0
[499] of the Value of 6,000l. and under the Value of 7,000l.	-	-	-	-	120	0	0

INVENTORY—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
of the Value of 7,000 <i>l.</i> and under the			
Value of 8,000 <i>l.</i> - - - -	140	0	0
of the Value of 8,000 <i>l.</i> and under the			
Value of 9,000 <i>l.</i> - - - -	160	0	0
of the Value of 9,000 <i>l.</i> and under the			
Value of 10,000 <i>l.</i> - - - -	180	0	0
of the Value of 10,000 <i>l.</i> and under the			
Value of 12,000 <i>l.</i> - - - -	200	0	0
of the Value of 12,000 <i>l.</i> and under the			
Value of 14,000 <i>l.</i> - - - -	220	0	0
of the Value of 14,000 <i>l.</i> and under the			
Value of 16,000 <i>l.</i> - - - -	250	0	0
of the Value of 16,000 <i>l.</i> and under the			
Value of 18,000 <i>l.</i> - - - -	280	0	0
of the Value of 18,000 <i>l.</i> and under the			
Value of 20,000 <i>l.</i> - - - -	310	0	0
of the Value of 20,000 <i>l.</i> and under the			
Value of 25,000 <i>l.</i> - - - -	350	0	0
of the Value of 25,000 <i>l.</i> and under the			
Value of 30,000 <i>l.</i> - - - -	400	0	0
of the Value of 30,000 <i>l.</i> and under the			
Value of 35,000 <i>l.</i> - - - -	450	0	0
of the Value of 35,000 <i>l.</i> and under the			
Value of 40,000 <i>l.</i> - - - -	525	0	0
of the Value of 40,000 <i>l.</i> and under the			
Value of 45,000 <i>l.</i> - - - -	600	0	0
of the Value of 45,000 <i>l.</i> and under the			
Value of 50,000 <i>l.</i> - - - -	675	0	0
of the Value of 50,000 <i>l.</i> and under the			
Value of 60,000 <i>l.</i> - - - -	750	0	0
of the Value of 60,000 <i>l.</i> and under the			
Value of 70,000 <i>l.</i> - - - -	900	0	0
of the Value of 70,000 <i>l.</i> and under the			
Value of 80,000 <i>l.</i> - - - -	1,050	0	0
of the Value of 80,000 <i>l.</i> and under the			
Value of 90,000 <i>l.</i> - - - -	1,200	0	0
of the Value of 90,000 <i>l.</i> and under the			
Value of 100,000 <i>l.</i> - - - -	1,350	0	0

INVENTORY—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
of the Value of 100,000 <i>l.</i> and under the			
Value of 120,000 <i>l.</i> - - -	1,500	0	0
of the Value of 120,000 <i>l.</i> and under the			
Value of 140,000 <i>l.</i> - - -	1,800	0	0
of the Value of 140,000 <i>l.</i> and under the			
Value of 160,000 <i>l.</i> - - -	2,100	0	0
of the Value of 160,000 <i>l.</i> and under the			
Value of 180,000 <i>l.</i> - - -	2,400	0	0
of the Value of 180,000 <i>l.</i> and under the			
Value of 200,000 <i>l.</i> - - -	2,700	0	0
of the Value of 200,000 <i>l.</i> and under the			
Value of 250,000 <i>l.</i> - - -	3,000	0	0
of the Value of 250,000 <i>l.</i> and under the			
Value of 300,000 <i>l.</i> - - -	3,750	0	0
of the Value of 300,000 <i>l.</i> and under the			
Value of 350,000 <i>l.</i> - - -	4,500	0	0
of the Value of 350,000 <i>l.</i> and under the			
Value of 400,000 <i>l.</i> - - -	5,250	0	0
of the Value of 400,000 <i>l.</i> and under the			
Value of 500,000 <i>l.</i> - - -	6,000	0	0
of the Value of 500,000 <i>l.</i> and under the			
Value of 600,000 <i>l.</i> - - -	7,500	0	0
of the Value of 600,000 <i>l.</i> and under the			
Value of 700,000 <i>l.</i> - - -	9,000	0	0
of the Value of 700,000 <i>l.</i> and under the			
Value of 800,000 <i>l.</i> - - -	10,500	0	0
of the Value of 800,000 <i>l.</i> and under the			
Value of 900,000 <i>l.</i> - - -	12,000	0	0
of the Value of 900,000 <i>l.</i> and under the			
Value of 1,000,000 <i>l.</i> - - -	13,500	0	0
of the Value of 1,000,000 <i>l.</i> and up-			
wards - - -	15,000	0	0

[501] LETTERS OF ADMINISTRATION,
without a Will annexed, to be granted in
England :

CONFIRMATION of any TESTAMENT dative,
to be expedited in any Commissary Court in Scot-
land, where the Deceased shall have died before

Duty.

or upon the 10th Day of October 1808, and subsequent to the 10th Day of October 1804;

INVENTORY to be exhibited and recorded in any Commissary Court in Scotland, of the Estate and Effects of any Person deceased who shall have died after the 10th Day of October 1808, without leaving any Testament or testamentary Disposition of his or her Personal or Moveable Estate or Effects, or any part thereof;

Where the Estate and Effects for or in respect of which such Letters of Administration or Confirmation respectively shall be granted or expedited, or whereof such Inventory shall be exhibited and recorded, exclusive of what the Deceased shall have been possessed of or entitled to as a Trustee for any other Person or Persons, and not beneficially, shall be

	above the Value of 20l. and under the Value of 50l.	-	-	-	0	10	0
	of the Value of 50l. and under the Value of 100l.	-	-	-	1	0	0
	of the Value of 100l. and under the Value of 200l.	-	-	-	3	0	0
	of the Value of 200l. and under the Value of 300l.	-	-	-	8	0	0
	of the Value of 300l. and under the Value of 450l.	-	-	-	11	0	0
[502]	of the Value of 450l. and under the Value of 600l.	-	-	-	15	0	0
	of the Value of 600l. and under the Value of 800l.	-	-	-	22	0	0
	of the Value of 800l. and under the Value of 1,000l.	-	-	-	30	0	0
	of the Value of 1,000l. and under the Value of 1,500l.	-	-	-	45	0	0
	of the Value of 1,500l. and under the Value of 2,000l.	-	-	-	60	0	0

INVENTORY—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
of the Value of 2,000 <i>l.</i> and under the			
Value of 3,000 <i>l.</i> - - -	75	0	0
of the Value of 3,000 <i>l.</i> and under the			
Value of 4,000 <i>l.</i> - - -	90	0	0
of the Value of 4,000 <i>l.</i> and under the			
Value of 5,000 <i>l.</i> - - -	120	0	0
of the Value of 5,000 <i>l.</i> and under the			
Value of 6,000 <i>l.</i> - - -	150	0	0
of the Value of 6,000 <i>l.</i> and under the			
Value of 7,000 <i>l.</i> - - -	180	0	0
of the Value of 7,000 <i>l.</i> and under the			
Value of 8,000 <i>l.</i> - - -	210	0	0
of the Value of 8,000 <i>l.</i> and under the			
Value of 9,000 <i>l.</i> - - -	240	0	0
of the Value of 9,000 <i>l.</i> and under the			
Value of 10,000 <i>l.</i> - - -	270	0	0
of the Value of 10,000 <i>l.</i> and under the			
Value of 12,000 <i>l.</i> - - -	300	0	0
of the Value of 12,000 <i>l.</i> and under the			
Value of 14,000 <i>l.</i> - - -	330	0	0
of the Value of 14,000 <i>l.</i> and under the			
Value of 16,000 <i>l.</i> - - -	375	0	0
of the Value of 16,000 <i>l.</i> and under the			
Value of 18,000 <i>l.</i> - - -	420	0	0
of the Value of 18,000 <i>l.</i> and under the			
Value of 20,000 <i>l.</i> - - -	465	0	0
of the Value of 20,000 <i>l.</i> and under the			
Value of 25,000 <i>l.</i> - - -	525	0	0
of the Value of 25,000 <i>l.</i> and under the			
Value of 30,000 <i>l.</i> - - -	600	0	0
of the Value of 30,000 <i>l.</i> and under the			
Value of 35,000 <i>l.</i> - - -	675	0	0
of the Value of 35,000 <i>l.</i> and under the			
Value of 40,000 <i>l.</i> - - -	785	0	0
of the Value of 40,000 <i>l.</i> and under the			
Value of 45,000 <i>l.</i> - - -	900	0	0
of the Value of 45,000 <i>l.</i> and under the			
Value of 50,000 <i>l.</i> - - -	1,010	0	0

[503]

INVENTORY—*continued*.

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
of the Value of 50,000 <i>l.</i> and under the Value of 60,000 <i>l.</i> - - -	1,125	0	0
of the Value of 60,000 <i>l.</i> and under the Value of 70,000 <i>l.</i> - - -	1,350	0	0
of the Value of 70,000 <i>l.</i> and under the Value of 80,000 <i>l.</i> - - -	1,575	0	0
of the Value of 80,000 <i>l.</i> and under the Value of 90,000 <i>l.</i> - - -	1,800	0	0
of the Value of 90,000 <i>l.</i> and under the Value of 100,000 <i>l.</i> - - -	2,025	0	0
of the Value of 100,000 <i>l.</i> and under the Value of 120,000 <i>l.</i> - - -	2,250	0	0
of the Value of 120,000 <i>l.</i> and under the Value of 140,000 <i>l.</i> - - -	2,700	0	0
of the Value of 140,000 <i>l.</i> and under the Value of 160,000 <i>l.</i> - - -	3,150	0	0
of the Value of 160,000 <i>l.</i> and under the Value of 180,000 <i>l.</i> - - -	3,600	0	0
of the Value of 180,000 <i>l.</i> and under the Value of 200,000 <i>l.</i> - - -	4,050	0	0
of the Value of 200,000 <i>l.</i> and under the Value of 250,000 <i>l.</i> - - -	4,500	0	0
of the Value of 250,000 <i>l.</i> and under the Value of 300,000 <i>l.</i> - - -	5,625	0	0
[504] of the Value of 300,000 <i>l.</i> and under the Value of 350,000 <i>l.</i> - - -	6,750	0	0
of the Value of 350,000 <i>l.</i> and under the Value of 400,000 <i>l.</i> - - -	7,875	0	0
of the Value of 400,000 <i>l.</i> and under the Value of 500,000 <i>l.</i> - - -	9,000	0	0
of the Value of 500,000 <i>l.</i> and under the Value of 600,000 <i>l.</i> - - -	11,250	0	0
of the Value of 600,000 <i>l.</i> and under the Value of 700,000 <i>l.</i> - - -	13,500	0	0
of the Value of 700,000 <i>l.</i> and under the Value of 800,000 <i>l.</i> - - -	15,750	0	0
of the Value of 800,000 <i>l.</i> and under the Value of 900,000 <i>l.</i> - - -	18,000	0	0

INVENTORY—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
of the Value of 900,000 <i>l.</i> and under the Value of 1,000,000 <i>l.</i> - -	20,250	0	0
of the Value of 1,000,000 <i>l.</i> and upwards - - - -	22,500	0	0

Exemption from all Stamp Duties.

Probate of Will, Letters of Administration, Confirmation of Testament, and Eik thereto, and Inventory of the effects of any Common Seaman, Marine, or Soldier, who shall be slain or die in the Service of His Majesty, His Heirs or Successors :

Additional Inventory to be exhibited and recorded in any Commissary Court in Scotland; where the same shall not be liable to a Duty of greater Amount than the Duty already paid upon any former Inventory exhibited and recorded of the Estate and Effects of the same Person.

[505] LEGACIES and SUCCESSIONS to Personal or Moveable Estate upon Intestacy.

1. *Where the Testator, Testatrix, or Intestate died before or upon the 5th Day of April 1805.*

For every Legacy, specific or pecuniary, or of any other Description, of the Amount or Value of 20*l.* or upwards, given by any Will or Testamentary Instrument of any Person who died before or upon the 5th Day of April 1805, out of his or her Personal or Moveable Estate, and which shall be paid, delivered, retained, satisfied or discharged, after the 31st Day of August 1815 :

Also for the clear Residue (when devolving to one Person) and for every Share of the clear Residue (when devolving to Two or more

LEGACIES and SUCCESSIONS—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
Persons) of the Personal or Moveable Estate of any Person, who died before or upon the 5th Day of April 1805 (after deducting Debts, Funeral Expences, Legacies, and other Charges first payable thereout), whether the Title to such Residue, or any Share thereof, shall accrue by virtue of any Testamentary Disposition, or upon a partial or total Intestacy; where such Residue, or Share of Residue, shall be of the Amount or Value of 20 <i>l.</i> or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged, after the Thirty-first Day of August 1815 :			

[506]	Where any such Legacy, or Residue, or Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Brother or Sister of the Deceased, or any Descendant of a Brother or Sister of the Deceased; a Duty at and after the Rate of Two Pounds and Ten Shillings <i>per Centum</i> , on the Amount or Value thereof	<i>per Cent.</i> 2 10 0
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Where any such Legacy, or Residue, or Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Brother or Sister of the Father or Mother of the Deceased, or any Descendant of a Brother or Sister of the Father or Mother of the Deceased; a Duty at and after the Rate of Four Pounds <i>per Centum</i> on the Amount or Value thereof	<i>per Cent.</i> 4 0 0
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Where any such Legacy, or Residue, or Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Brother or Sister of a Grandfather or Grandmother of the deceased, or any Descendant of a Brother or Sister of a Grandfather or Grandmother of the Deceased; a

LEGACIES and SUCCESSIONS—*continued.*

Duty.

Duty at and after the Rate of Five pounds <i>per Centum</i> on the Amount or Value there- of - - - - -	<hr/>		
	<i>L.</i>	<i>s.</i>	<i>d.</i>
		<i>per Cent.</i>	
	5	0	0
And where any such Legacy, or Residue or Share of such Residue, shall have been given, or have devolved, to or for the Benefit of any Person in any other Degree of Collateral Consanguinity to the deceased than is above described, or to or for the Benefit of any Stranger in blood to the Deceased; a Duty at and after the Rate of Eight Pounds <i>per</i> <i>Centum</i> on the Amount or Value thereof -			
		<i>per Cent.</i>	
	8	0	0

[507] II. *Where the Testator, Testatrix, or Intestate shall have died after the 5th Day of April 1805.*

For every Legacy, specific or pecuniary, or of any other Description, of the Amount or Value of 20*l.* or upwards given by any Will or Testamentary Instrument, of any Person, who shall have died after the 5th Day of April 1805, either out of his or her Personal or Moveable Estate, or out of or charged upon his or her Real or Heritable Estate, or out of any Moneys to arise by the Sale, Mortgage or other Disposition of his or her Real or Heritable Estate, or any Part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st Day of August 1815 :

Also, for the clear Residue (when devolving to One Person) and for every Share of the clear Residue (when devolving to Two or more Persons) of the Personal or moveable Estate, of any person, who shall have died after the 5th Day of April 1805, (after deducting Debts, funeral expences, Legacies and other

LEGACIES and SUCCESSIONS—*continued.*

Duty.

L. s. d.

Charges first payable thereout), whether the Title to such Residue, or any share thereof, shall accrue by virtue of any Testamentary Disposition, or upon a partial or total Intestacy; where such Residue, or Share of Residue, shall be of the Amount or Value [508] of 20l. or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged after the 31st Day of August 1815 :

And also for the clear Residue (when given to one Person) and for every Share of the clear Residue (when given to Two or more Persons) of the Moneys to arise from the Sale, Mortgage or other Disposition of any Real or Heritable Estate, directed to be sold, mortgaged, or otherwise disposed of, by any Will or Testamentary Instrument, of any Person, who shall have died after the 5th Day of April 1805 (after deducting Debts, Funèral Expences, Legacies and other Charges first made payable thereout, if any) where such Residue, or Share of Residue, shall amount to 20l. or upwards, and where the same shall be paid, retained or discharged after the 21st Day of August 1815 :

Where any such Legacy or residue, or any Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Child of the Deceased, or any Descendant of a child of the Deceased, or to or for the Benefit of the Father or Mother, or any lineal Ancestor of the Deceased ; a Duty at and after the Rate of One Pound *per Centum* on the Amount or Value thereof - -

per Cent.
1 0 0

Where any such Legacy, or Residue, or any Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a

LEGACIES and SUCCESSIONS—*continued.*

	Duty.		
	<i>L.</i>	<i>s.</i>	<i>d.</i>
[509] Brother or Sister of the Deceased, or any Descendant of a Brother or Sister of the Deceased; a Duty at and after the Rate of Three Pounds <i>per Centum</i> on the Amount or Value thereof - - - -		<i>per Cent.</i>	
		3	0 0
Where any such Legacy, or Residue, or any Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Brother or Sister of the Father or Mother of the Deceased, or any Descendant of a Brother or Sister of the Father or Mother of the Deceased; a Duty at and after the rate of Five Pounds <i>per Centum</i> on the amount or Value thereof - - - -		<i>per Cent.</i>	
		5	0 0
Where any such Legacy, or Residue, or any Share of such Residue, shall have been given, or have devolved, to or for the Benefit of a Brother or Sister of a Grandfather or Grandmother of the Deceased, or any Descendant of a Brother or Sister of a Grandfather or Grandmother of the Deceased; a Duty at and after the Rate of Six Pounds <i>per Centum</i> on the Amount or Value thereof -		<i>per Cent.</i>	
		6	0 0
And where any such Legacy, or Residue, or any Share of such Residue, shall have been given, or have devolved, to or for the Benefit of any Person, in any other Degree of collateral Consanguinity to the Deceased than is above described, or to or for the Benefit of any Stranger in blood to the Deceased; a Duty at and after the Rate of Ten Pounds <i>per Centum</i> on the Amount or Value thereof		<i>per Cent.</i>	
		10	0 0
[510] And all gifts of Annuities, or by way of Annuity, or of any other partial Benefit or Interest, out of any such Estate or Effects as aforesaid, shall be deemed Legacies within the Intent and Meaning of this Schedule.			
And where any Legatee shall take Two or			

LEGACIES and SUCCESSIONS—*continued.*

Duty.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
more distinct Legacies or Benefits under any Will or Testamentary Instrument, which shall together be of the Amount or Value of 20 <i>l.</i> each shall be charged with Duty, though each or either may be separately under that Amount of Value.			

Exemptions.

Legacies, and Residues, or Shares of Residue, of any such Estate or Effects as aforesaid, given or devolving to or for the Benefit of the Husband or Wife of the Deceased, or to or for the Benefit of any of the Royal Family.

And all Legacies which were exempted from Duty by the Act passed in the 39th Year of His Majesty's Reign, *c.* 73, for exempting certain specific Legacies given to Bodies Corporate, or other Public Bodies, from the Payment of Duty.

By Sect. 2. It is enacted, That there shall be raised, levied, and paid unto and for the Use of his Majesty, His Heirs and Successors, in and throughout the Whole of Great Britain, for and in respect of the several instruments, Matters, and Things, mentioned [511] and described in the schedule hereunto annexed (except those standing under the Head of Exemptions) or for or in respect of the Vellum, Parchment, or Paper, upon which such Instruments, Matters and Things, or any of them shall be written or printed, the several Duties or Sums of Money set down in Figures against the same respectively, or otherwise specified and set forth in the same Schedule; and that the yearly Per-centage Duty on Insurances from Loss by Fire, therein mentioned, shall commence and take place from and after the Twenty-eighth Day of September, One thousand eight hundred and fifteen; and that all the other Duties therein mentioned shall commence and take place from and after the Thirty-first day of August, One thousand eight hundred and fifteen; and that the said Schedule and all the Provisions, Regula-

tions, and Directions therein contained with respect to the said Duties, and the Instruments, Matters, and Things charged therewith, shall be deemed and taken to be Part of this Act, and shall be read and construed as if the same had been inserted herein at this Place, and shall be applied, observed, and put into Execution accordingly.

By Sect. 37. It is enacted, That from and after the thirty-first Day of August One thousand eight hundred and fifteen, if any Person shall take possession of, and in any Manner administer, any Part of the Personal Estate and Effects of any Person deceased, without obtaining Probate of the Will or Letters of Administration of the Estate and Effects of the Deceased, within Six Calendar Months after his or her decease, or within Two Calendar Months after the Termination of any Suit or Dispute respecting the Will or the Right to Letters of Administration, if there shall be any such which shall not be ended within Four Calendar Months after the Death of the Deceased; every Person so offending shall forfeit the Sum of One Hundred Pounds, and also a further Sum, at and after the Rate of Ten Pounds *per Centum* on the Amount of the Stamp Duty payable on the Probate of the Will or Letters of Administration of the Estate and Effects of the Deceased.

[512] Sect. 38. That from and after the Expiration of three Calendar months from the passing of this Act, no ecclesiastical Court or Person shall grant Probate of the Will or Letters of Administration of the Estate and Effects of any Person deceased, without first requiring and receiving from the person or persons applying for the Probate or Letters of Administration, or from some other competent person or Persons, an affidavit, or solemn affirmation in the case of Quakers, that the Estate and Effects of the Deceased, for or in respect of which the Probate or Letters of Administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the Leasehold estates for years of the deceased, whether absolute or determinable on Lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified to the best of the Deponents or Affirmants knowledge, information, and belief, in order that the proper and full Stamp Duty may be paid on such Probate or letters of administration; which affidavit or affirmation shall be made before the Surro-

gate or other Person who shall administer the usual oath for the due Administration of the Estate and Effects of the Deceased.

Sect. 39. That every such affidavit or affirmation, shall be exempt from Stamp Duty and shall be transmitted to the said Commissioners of Stamps, together with the copy of the Will, or extract or account of the letters of administration to which it shall relate, by the Registrar or other Officer of the Court, whose Duty it shall be to transmit Copies of Wills, and Extracts or Accounts of Letters of Administration, to the said Commissioners, for the better Collection of the Duties on Legacies and Successions to Personal Estate upon Intestacy; and if any Registrar or other Officer whose Duty it shall be, shall neglect to transmit such Affidavit or Affirmation to the said Commissioners of Stamps, as hereby directed, every Person so offending shall forfeit the Sum of Fifty Pounds.

[513] Sect. 40. That from and after the passing of this Act, where any Person, on applying for the Probate of a Will or Letters of Administration, shall have estimated the Estate and Effects of the Deceased to be of greater Value than the same shall have afterwards proved to be, and shall in consequence have paid too high a Stamp Duty thereon, if such Person shall produce the Probate or Letters of Administration to the said Commissioners of Stamps, within Six Calendar Months after the true Value of the Estate and Effects shall have been ascertained, and it shall be discovered that too high a Duty was first paid on the Probate or Letters of Administration, and shall deliver to them a particular Inventory and Account and Valuation of the Estate and Effects of the Deceased, verified by an Affidavit, or solemn Affirmation in the Case of Quakers; and if it should thereupon satisfactorily appear to the said Commissioners, that a greater Stamp Duty was paid on the Probate or Letters of Administration than the Law required, it shall be lawful for the said Commissioners to cancel and expunge the Stamp on the Probate or Letters of Administration, and to substitute another Stamp for denoting the Duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or, if the difference be considerable, to repay the same in money, at the discretion of the said Commissioners.

Sect. 41. That from and after the passing of this Act, where any Person, on applying for the Probate of a Will or Letters of

Administration, shall have estimated the Estate and Effects of the Deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little Stamp Duty thereon, it shall be lawful for the said Commissioners of Stamps, on delivery to them of an affidavit or solemn affirmation of the Value of the Estate and Effects of the deceased, to cause the Probate or Letters of Administration to be duly stamped, on Payment of the full Duty which ought to have been originally paid [514] thereon in respect of such Value, and of the further Sum or Penalty payable by Law for stamping Deeds after the Execution thereof, without any Deduction or allowance of the Stamp Duty originally paid on such Probate or Letters of Administration: Provided always, that if the application shall be made within Six Calendar Months after the true Value of the Estate and Effects shall be ascertained, and it shall be discovered that too little Duty was at first paid on the Probate or Letters of Administration; and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said Commissioners, that such Duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the Estate and Effects belonged to the deceased, and without any intention of Fraud, or to delay the Payment of the full and proper Duty, then it shall be lawful for the said Commissioners to remit the before-mentioned penalty, and to cause the Probate or Letters of Administration to be duly stamped, on payment only of the sum which shall be wanting to make up the Duty which ought to have been at first paid thereon.

Sect. 42. That in cases of letters of Administration on which too little Stamp Duty shall have been paid at first, the said Commissioners of Stamps shall not cause the same to be duly stamped in the manner aforesaid, until the Administrator shall have given such security to the Ecclesiastical Court or Ordinary by whom the Letters of Administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the Estate and Effects of the Deceased had been then ascertained, and also that the said Commissioners of Stamps shall yearly, or oftener, transmit an account of the Probates and letters of Administration, upon which the Stamps shall have been rectified in pursuance of this Act, to the several Ecclesiastical Courts

by which the same shall have been granted, together with the value of the Estate and Effects of the Deceased, upon which such rectification shall have proceeded.

[515] Sect. 43. That where too little duty shall have been paid on any Probate or Letters of Administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the Estate and Effects belonged to the Deceased, if any Executor or Administrator acting under such Probate or Letters of Administration shall not, within six Calendar months after the passing of this Act, or after the discovery of the mistake or misapprehension, or of any Estate or Effects not known at the time to have belonged to the Deceased, apply to the said Commissioners of Stamps, and pay what shall be wanting to make up the Duty which ought to have been paid at first on such Probate or Letters of Administration, he or she shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the sum wanting to make up the proper duty.

Sect. 44. That from and after the Expiration of Three Calendar months from the passing of this Act, it shall not be lawful for any Ecclesiastical Court or Person to call in and revoke, or to accept the surrender of any Probate or Letters of Administration, on the ground only of too high or too low a Stamp Duty having been paid thereon, as heretofore hath been practised; and if any Ecclesiastical Court or Person shall so do, the Commissioners of Stamps shall not make any allowance whatever for the Stamp Duty on the Probate or Letters of Administration which shall be so annulled.

Sect. 45. As it has happened in the case of Letters of Administration on which the proper Stamp Duty hath not been paid at first, that certain debts, chattels real or other Effects, due or belonging to the Deceased, have been found to be of such great value, that the Administrator hath not been possessed of money sufficient either of his own or of the Deceased to pay the requisite Stamp Duty, in order to render such Letters of Administration, available for the recovery thereof by law: And whereas the like [516] may occur again, and it may also happen that Executors or Persons entitled to take out Letters of Administration may, before obtaining Probate of the Will or Letters of Administration of the Estate and Effects of the Deceased, find some considerable part or parts of the Estate and Effects of the Deceased so circumstanced

as not to be immediately got possession of, and may not have money sufficient either of their own or of the deceased to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain; it is enacted, That from and after the passing of this act, it shall be lawful for the said Commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped, for denoting the duty payable, or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before-mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this act; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said Commissioners, by a bond to His Majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of ten pounds *per centum per annum*, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.

Sect. 46. Provided, That if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of [517] administration, it shall appear to the satisfaction of the said Commissioners, that the executor or administrator to whom such credit shall be given as aforesaid, shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions as they shall think expedient.

Sect. 47. Provided also, That the probate or letters of administration so to be stamped on credit as aforesaid, shall be deposited with the said Commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, to-

gether with such interest as aforesaid, if any shall become due ; but the same shall nevertheless be produced in evidence by some officer of the Commissioners of stamps, at the expense of the executor or administrator, as occasion shall require.

Sect. 48. That the duty for which credit shall be given as aforesaid, shall be a debt to His Majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to, and before any other debt whatsoever due from the same estate ; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds.

Sect. 49. That if before payment of the duty for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non*, to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same effects, in such and the same manner [518] as if the duty had been actually paid, upon having letters of administration *de bonis non* deposited with the said Commissioners, and upon having such further security for the payment of the duty, as they shall think expedient ; and such letters of administration shall be as valid and available as if the duty for which credit shall be given had been paid.

Sect. 50. In regard to probate of wills and letters of administration, That where any part of the personal estate which the deceased was possessed of or entitled to, shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said act of the forty-eighth year of His Majesty's reign, shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Sessions or Court of Exchequer in Scotland, or before one of His Majesty's Justices of the peace in Scotland, or before a Master in Chancery Ordinary or Extraordinary in Ireland, or before any Judge or civil magistrate of any other country or place where the party or parties shall happen to reside;

and every such affidavit or affirmation shall be as effectual as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last-mentioned act.

Sect. 51. Provided, That where it shall be proved by oath or proper vouchers to the satisfaction of the said Commissioners of stamps, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from the amount or value of the estate and effects of the deceased, for or in respect of which a probate or letters of administration, or a compensation of a testament, testamentary or dative, shall have been granted after the thirty-first day of August one thousand eight hundred and fifteen, or which shall be included in any inventory exhibited and recorded in a Commissary Court in Scotland as the law requires, after that day, shall reduce the same to a sum which, if it had been the whole gross amount or value [519] of such estate and effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration, or confirmation or inventory, than shall have been actually paid thereon under and by virtue of this act, it shall be lawful for the said Commissioners to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration or confirmation, or the recording of such confirmation as aforesaid; but where, by reason of any proceeding at law or in equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid, within the said term of three years, it shall be lawful for the Commissioners of the treasury to allow such further time for making the claim, as may appear to them to be reasonable under the circumstances of the case.

By Sect. 8. It is enacted, that the powers and provisions of former acts shall be put in execution, with regard to the duties under this act. It is therefore necessary to recur to the Statutes 36 Geo. 3., 45 Geo. 3. and 48 Geo. 3.

By the stat. 36 Geo. 3. c. 52. sect. 3. It is enacted, That the duties thereby imposed shall be under the management of the Commissioners of stamps, who are to prepare proper stamps, denoting each rate, and to do all acts for carrying that act into execution.

Sect. 5. And that all persons may be able to take receipts for legacies, and residue, or shares of residue, according to that Act, the Commissioners are to provide paper adapted for such receipts, and to print thereon the form of words in the schedule annexed to that Act, and any person requiring them may fill them up with sums, names, and dates according to the aforesaid provisions, or use the like form on any other paper, vellum, or parchment.

[520] Sect. 6. That in all cases wherein it is not thereby otherwise provided, the duties shall be paid by an executor or administrator, on retaining for himself or for any other person, or on delivering or satisfying to any other person, any legacy or residue, or share of residue; and where any executor or administrator shall retain, but not have paid the duty, the duty shall be a debt to His Majesty from the executor or administrator; and where the legacy is paid, without paying or retaining the duty, the duty shall be a debt from the executor or administrator and the legatee, or party in distribution.

Sect. 7. That any gift by will to be satisfied out of the personal estate of any person dying after that act, or out of the personal estate which such person shall have power to dispose of, shall be deemed a legacy within that act, whether given by way of annuity, or in any other form, and whether charged only on personal estate or charged also on real estate, except so far as it shall be paid out of real estate*, in a due execution of the will; and every *donatio mortis causa* shall be deemed a legacy under that act.

Sect. 8. That the value of annuities for lives, or years, or other times to be calculated, and the duties thereon, shall be charged according to table in the schedule annexed to that act, and the duty to be paid by four equal payments, viz. on completing the payment of the respective four first years, and the value of such annuity, if determinable on any contingency besides the death of any person, to be calculated without regard to such contingency. But if such annuity determine by death before the four years payment be due, then the duty shall be payable only in proportion to so many of the payments as became due; and where the annuity shall determine on any other contingency, not only all future payments of the duty shall cease, but the person who shall have previously paid any such duty may obtain a return of so much as to

* But now see stat. 15 Geo. 3. c. 28. above referred to.

reduce it to so much as would be payable for the annuity calculated according to the term for which it should have endured, and that such abatement shall be settled by the Commissioners according to the tables in the schedule.

Sect. 9. That the value of annuities payable out of a legacy shall be calculated, and the duty charged thereon in the same manner as directed with regard to general annuities, and the duty on such legacy (if any duty shall be payable thereon) shall be calculated on the value of the legacy, after deducting the value of the annuity; and the duty for the annuity shall be paid by the person entitled to the legacy, subject to the like proviso as the duty on general annuities, and shall be deducted out of the annuities for the first four years, or so long as the said annuities shall be paid.

Sect. 10. That the duty on a legacy given for purchasing an annuity of a certain amount shall be calculated on the sum necessary to purchase such annuity according to the aforesaid tables, and shall be deducted from such sum, and paid as on pecuniary legacies, and the annuity to be purchased shall be reduced in proportion to the duty payable thereon.

Sect. 11. That if any benefit shall be given in such terms that the amount or value can only be ascertained from time to time by the actual application of the fund; or if the amount or value of such benefit cannot, by reason of the form or manner of the gift, be so ascertained that the duty can be charged thereon under any of the aforesaid directions, then such duty shall be charged on the sums or effects which shall be applied from time to time for such respective purposes, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

Sect. 12. That the duty on a legacy or residue to be enjoyed by different persons in succession, who shall be chargeable with the duties at the same rate, shall be paid as in case of a legacy to one [522] person; and where a legacy given so as to be enjoyed in succession by different persons, some one of whom shall not be liable to any duty, and others liable to different duties, so that one rate of duty cannot be immediately charged, all persons who shall be entitled for life, or for any temporary interest, shall be charged with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity; such charges shall begin when the parties begin to receive the produce,

and shall be paid by equal yearly payments for four years, if they so long receive such produce ; and all persons who shall become absolutely entitled to such legacy so to be enjoyed in succession shall, when they shall begin to receive the profit thereof, pay the duty for the same, or for such part as shall be so received, in the same manner as if it had been given immediately.

Sect. 13. That the duty on a legacy or residue to be enjoyed by different persons in succession, on whom the duty is chargeable at the same rate, shall be deducted and paid by the executor or administrator, on payment of the legacy or residue to any trustee ; and where the legacy or residue shall not be paid to a trustee, the duty shall be paid out of the capital of the property so given, on receipt of any part of the produce by any of the persons so entitled in succession, according to the amount of the capital of which such produce shall be so received ; and where the duty shall be chargeable at different rates, the executor or administrator shall be chargeable with such duties in succession in like manner as if on an immediate bequest, unless where the property shall have been vested in trustees, in which case the trustees shall be chargeable with the duties as if they were executors or administrators ; and where any partial interest shall be given, or shall arise out of any such property, so to be enjoyed in succession, and such partial interest shall be satisfied by any person enjoying the property, such person shall be charged with the duties payable for such partial [523] interest, and shall pay and retain the same as if he were executor, and shall be debtor to the King for it as if executor.

Sect. 14. That no duty shall be paid on plate, furniture, or other things not yielding any income, and given to persons in succession, till the same shall be actually sold, or shall come to some person having power to sell the same, or having an absolute interest therein, and shall be then charged on that person only, and not on the executor by reason of his having assented to such bequest.

Sect. 15. That where different persons shall be entitled in succession to a legacy, the duty shall be charged thereon as given to be enjoyed in succession, whether the parties entitled thereto shall take the same under a will or under an intestacy.

Sect. 16. That where a legacy shall be given in joint-tenancy to persons, some or one of whom shall be chargeable with the duty, and any others not chargeable, the person or persons chargeable

shall afterwards, by survivorship or severance, become entitled to a larger interest, he shall pay the duty on such increased interest.

Sect. 17. That where a legacy shall be given subject to a contingency on which the same may go to another person, such bequest, unless chargeable as an annuity, shall be charged with duty as an absolute bequest, and such duty shall be paid out of the capital of such legacy, notwithstanding the same may, on such contingency, go to a person not chargeable with the same duty, or with any duty. And if the legacy on such contingency go to a person chargeable with a higher rate of duty than the duty so paid, the person becoming entitled shall pay the difference.

Sect. 18. That where a legacy shall be subjected to a power of appointment in favour of particular persons, such property shall be charged with duty as property given in succession, and all parties [524] shall be charged in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment. And where any property shall be given for a limited interest, and an absolute power of appointment shall also be given to any person, who would not be entitled in default of appointment, such property, on the execution of such power, shall be charged with the same duty as if the same property had been immediately given to the person executing the power, after allowing any duty before paid in respect thereof. And where property shall be given with a general power of appointment, which property, in default of appointment, would belong to the party having the power; the duty shall be paid by that person as if it had been an absolute legacy.

Sect. 19. That money or personal estate directed to be laid out in the purchase of real estate, shall pay duty as personal estate, unless the same shall be given to be enjoyed in succession, and then each person entitled thereto in succession shall pay duty for the same, as if there had been no direction for such purchase of real estate, unless the same were applied in such purchase before such duty accrued; but if before the same shall be so applied in the purchase of real estate, any person shall become absolutely entitled to the inheritance thereof in possession, the same duty shall be paid thereon as would have been payable on general personal estate.

Sect. 20. That estates *pur auter vie* applicable by law as personal estate, shall be charged with the duties as personal estate.

Sect. 21. That money given by will to pay the legacy duty shall not be charged with the duty.

Sect. 22. That where specific legacies, and the residue of personal estate consists of property not reduced into money, the executor or administrator may set a value thereon, and offer the duty thereon at the Stamp Office, or may require the commissioners to appoint an appraiser at the expence of the executor or administrator, and the commissioners may accept the duty so offered. But [525] if the commissioners shall not be satisfied with such offer, they may appoint a person to appraise, and may assess the duty on such appraisement, and demand such duty. But the parties may cause that appraisement to be reviewed by the commissioners of the land tax for the district where the effects shall be, at their next meeting, if fourteen days shall have intervened, and if not, then at their then next meeting, giving six days notice to the commissioners of stamps; and the commissioners of the land tax may appoint an appraiser and hear such appeal, and their determination shall be final; and if the valuation of the commissioners of stamps shall not be appealed from within the time aforesaid, or shall be affirmed, the duty shall be paid accordingly; and if it shall be varied on the appeal, the duty shall be paid according to the variation; and if the duty assessed as aforesaid shall exceed the duty first offered, the expence of the appraisement, and other proceedings in assessing such duty, shall be paid by the executor or administrator; and if any dispute arise between any person entitled to any such legacy or residue, and the executor or administrator, with respect to the value thereof, or the amount of the duty payable thereon, the duty shall be assessed by the commissioners of the stamps, or the commissioners of land tax on appeal as before; and where the effects are ten miles from London, a person deputed by the commissioners of stamps shall act for them, but under their controul.

Sect. 23. That where any legacy shall be satisfied otherwise than by payment of money, or application of specific effects for that purpose, or shall be compounded for less than the amount, the duty shall be paid only on such amount, provided that if any bequest be made in satisfaction of any other legacy or bequest unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.

Sect. 24. That where an executor or administrator shall offer to pay or deliver a legacy or residue on payment of the duty, and it shall be refused, and a release or discharge shall be refused, then, although no actual tender be made, if a suit shall be afterwards instituted, the court may order all costs to be paid by the person who so refused, and also order such person to give a discharge, and may deduct such costs with the duty out of the legacy or effects; and in case of a suit for a legacy or residue, the court may in a summary way order the payment of the legacy or residue, and the duty and costs.

Sect. 25. That if any suit shall be instituted concerning the administration of the personal estate of any testator or intestate, in which any direction shall be given for payment of any legacies or residue, the court shall in such direction provide for the payment of the aforesaid duties; and in all accounts of personal estate, the court shall take care that no allowance be made for any legacy or residue without proof of payment of the duties payable thereon.

Sect. 26. That no executor or administrator may pay or deliver a legacy, or any part of a legacy, or make distribution of any part of the personal estate, on payment of the proportion of the duties in respect of such parts of the personal estate as shall be so administered.

Sect. 27. That no executor or administrator, or trustee, shall pay, deliver, or satisfy, or compound for any legacy or residue of personal estate, or any part thereof thereby subjected to a duty, without taking a receipt or discharge in writing, expressing the date of such receipt and name of the testator or intestate, and the name of the legatee or party in distribution, and of the person to whom the receipt is given, and the amount of the legacy or residue, or part thereof, and of the duty payable thereon, and no written receipt shall be received in evidence, unless stamped as required by that act, and no evidence shall be given of payment [527] of any such legacy or residue, or part of residue, without producing such receipt stamped, unless payment of the duty shall be first proved; provided that a copy of the entry in the commissioners' books shall be evidence of such payment: provided also, that payment of any annuity, or legacy charged as an annuity, shall not be deemed a payment for which such stamped receipt shall be required, except that which shall complete the payment for the first four years.

Sect. 28. That any executor, or administrator, or trustee, or other person liable to pay the aforesaid duty, who shall pay, or satisfy, or compound for any legacy or residue, without taking such receipt as aforesaid, and causing it to be stamped within the time allowed by that act, shall forfeit ten per cent. on the money or value for which such receipt ought to have been given; and every person receiving such legacy or residue, without signing such receipt, expressing the duty to have been allowed or paid, and dated on the day of signing, shall forfeit ten per cent. on the money or value of the property so received or taken.

Sect. 29. That every such receipt shall be brought within twenty-one days from the date to the stamp office or other appointed office, to be stamped, paying the duty for it, and on such payment the proper officer shall write thereon an acknowledgment of the duty paid in words in length, and bearing date on the day of payment, and sign it, and enter an account in a proper book, and then the receipt shall be stamped with the proper one of the four stamps; and if the duty shall be paid at any inferior office, the receipt, with the acknowledgment of the duty paid, shall within twenty-one days be sent to the head office, and be there stamped; and the inferior officer shall sign an acknowledgment that such receipt was left with him for such purpose, and such acknowledgment shall be returned to him on his re-delivering the legacy receipt stamped; but if any such legacy receipt shall not be brought to any such office within twenty-one days, it may be brought in like manner within three calendar months after the [528] date thereof, paying the duty, and ten per cent. on that duty as a penalty, and the receipt may be then stamped. But the commissioners shall not, on any pretence, except as aftermentioned, stamp any receipt unless the duty shall be paid, and the receipt produced to be stamped in manner and within the times respectively limited as aforesaid.

Sect. 30. That if it shall appear to the satisfaction of the commissioners, on oath or affirmation, before a Justice of peace, or Master or Masters extraordinary in Chancery, that less duty has been paid for any legacy or residue than ought to have been paid by mistake, without intent to defraud, and if application be made to the commissioners to rectify such mistake before any suit, and within three calendar months after payment of what was really paid, the commissioners may accept the difference with ten per

cent. thereon, as a penalty in full of the duty and all penalties, and may cause an acknowledgment to be written after the payment of the just duty on the receipt, and cause the receipt to be properly stamped.

Sect. 31. That the party paying or receiving any legacy or residue contrary to the provisions of that act, who shall, within twelve calendar months after the offence committed, discover the other party or parties offending, so that he or they may be thereof convicted, they shall be discharged from all penalties incurred under that act.

Sect. 32. That where by reason of the infancy, or absence beyond sea, of a legatee, or party in distribution, the executor or administrator cannot pay any legacy or residue, though he may have assets, he may pay such legacy or residue, or any part thereof, deducting the duty, into the Bank, with the privity of the accountant general of the Court of Chancery, to the account of the person entitled, and such payment shall be a sufficient discharge provided the duty be paid, and the accountant general shall lay it out, without any formal request, in the purchase of three per cent. consolidated annuities, which, with the dividends thereon, shall be transferred to the party entitled, by application to the Court [529] of Chancery on motion or by petition in a summary way, provided that if the money afterwards appear to have been improperly paid in, the Court may on petition in a summary way dispose of it as justice shall require; and if it shall appear that too much duty has been paid, the excess shall be returned by the commissioners of stamps; and if it shall appear that the duty paid was too little, the party who paid the money into the Bank may pay the deficiency, with the penalties, if any, and may apply to the Court of Chancery in a summary way for repayment of the further money so paid to the commissioners for duty out of the money in the Bank.

Sect. 33. That if at the end of two years after the death of the testator or intestate, it shall appear to the commissioners, that it will require time to collect the debts or effects, or that from circumstances it will be difficult to ascertain and adjust the amount of the residue, and the parties interested shall desire to compound the duty, the parties, with consent of the commissioners, may apply to the Court of Exchequer in England or Scotland, if the deceased resided there, and in manner prescribed in the clause, obtain leave for such purpose.

Sect. 34. That if any time after paying the duty on a legacy, or a residue, it shall be necessary for any legatee or party entitled, to refund all or any part of what he received, the commissioners may on due proof made on oath of the amount of such sum refunded, repay the money over-received for the duty.

* Sect. 35. That where an executor or administrator shall be entitled to any legacy or residue, he shall be chargeable with the duty when he shall be entitled in a course of administration to retain it, and he shall, before retaining, transmit to the commissioners of stamps a note of the particulars intended to be retained, and the amount and value thereof, and the duty he offers thereon, and the commissioners shall charge the proper duty thereon and it shall be paid; and on such payment the proper officer shall at the foot of a duplicate of the assessment duly stamped give a receipt for the said duty, which receipt shall be a discharge for the duty; and if such executor or administrator shall neglect to pay such duty within fourteen days after it ought to have been paid, he shall forfeit and pay treble the value of the duty.

Sect. 37. That if probate, or grant of administration shall be repealed after the executor or administrator shall have paid any of the said duties out of the effects of the deceased which shall not be allowed to him because improperly paid, the commissioners shall repay the duties so paid. But if the duty ought to have been paid by the rightful executor or administrator, then the payment shall be valid, and allowed by him in account, and shall be deemed made as in a due course of administration.

Sect. 38. That persons swearing or affirming falsely touching the said duties, shall be subject to the penalties of perjury.

Sect. 39. That persons altering any assessment or receipt after the same shall have been signed by the proper officer; or when altered, utter or publish the same as true, with intent to defraud His Majesty, shall forfeit five hundred pounds.

Sect. 49. That persons counterfeiting the said stamps shall suffer death as in case of felony without benefit of clergy.

* Upon this section it has been decided that the legacy duty is to be paid upon the aggregate amount of the residue of the testator's property, at the time of the executor's delivering into the stamp office the note of what he intends to retain as residuary legatee. And that interest accumulated upon the residue constitutes part thereof, and is liable to the duty. *Attorney-General v. Lord G. H. Cavendish*, 1 Wightwick, 82.

Sect. 45. That one moiety of all penalties and forfeitures thereby imposed, where no other mode of prosecution is thereby prescribed, shall, if sued for within three calendar months next after they were incurred, be to the King, and the other moiety, with the full costs of suit, to the informer or person suing for them within the time aforesaid; and they may be sued for in the Court of Exchequer in England for offences in England, and in [531] Scotland for offences there. But proceedings may be stopped, if it appear that the penalties were incurred without intention of fraud.

Sect. 44. That in default of prosecution for such penalties within the time aforesaid they shall be recoverable only for the crown, by information in the Court of Exchequer in England and Scotland respectively.

Sect. 47. That all actions or suits, which shall be commenced against any person for any thing done in pursuance of that act, shall be commenced within six calendar months after the fact committed, and not afterwards.

By the stat. 45 Geo. 3. c. 28. sec. 2. it is enacted, That the duties granted by this act shall not extend to, or be charged or payable in respect of any legacies satisfied out of any real or personal estate, or in respect of any residue or share of any personal estate, or of any moneys, or residues, or parts or shares of moneys arising from the sale of any real estate of any person dying before the passing of this act.

Sect. 3. That nothing herein contained shall extend to charge with any of the duties hereby granted any legacy or residue, or part or share of residue, which shall be given or pass to or for the benefit of the husband, or wife of the deceased; or to or for the benefit of any of the royal family.

Sect. 4. That every gift by any will or testamentary instrument of any person dying after the passing of this act, which by virtue of any such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by

way of annuity, or in any other form, shall be deemed and taken [532] to be a legacy within the true intent and meaning of this Act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this Act granted, any specific sum of money, or any share or proportion thereof, charged by any marriage settlement or deed upon any real estate, in any case in which any such specific sum, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed.

Sect. 5. That the duties hereby granted upon legacies, or charged upon, or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such moneys, shall be accounted for, answered, and paid by the trustees, to whom the real estate shall be devised, out of which the legacy, or any money arising out of the sale or mortgage, or other disposition of such real estate shall be to be paid or satisfied; or if there shall be no trustees, then by the person entitled to such real estate, subject to any such legacy, or by the person empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy, or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in Stat. 36 Geo. 3. c. 52.

By Stat. 42 Geo. 3. c. 99. Sect. 2. it is enacted, That in every case in which an executor or executors, or administrator or administrators, shall not have paid the duties granted and payable upon or in respect of any legacies or any personal estate, or any share or shares of any personal estate, of any persons dying intestate, by and in pursuance of an Act passed in the thirty-sixth year of the reign of His present Majesty, or any other Act or Acts of Parliament relating to duties on legacies or shares of personal estates, within proper and reasonable time, it shall be lawful [533] for His Majesty's Court of Exchequer, upon application to be made for that purpose on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment, or paper, on such affidavit or affidavits as to the said Court may appear to be sufficient, to grant a rule, requiring such executor or executors, administrator or administrators, to shew cause why he, she

or they should not deliver to the said commissioners an account, upon oath, of all the legacies, or of the personal property, respectively paid, or to be paid, or administered by him, her or them, as the case may be, and why the duties on any such legacies, or any shares or residue of any such personal estate, have not been paid, or should not be forthwith paid according to law, and to make any such rule of court absolute in every case in which the same may appear to the said court to be proper and necessary for the better enforcing the payment of any of the said duties.

By the Statute 48 Geo. 3. c. 149. sect. 35. it is enacted, That from and after the passing of this Act, the probate of the will of any person deceased, or the letters of administration of the effects of any person deceased, heretofore granted, or to be hereafter granted, either before or upon or after the tenth day of October, one thousand eight hundred and eight, shall be deemed and taken to be valid, and available by the executors or administrators of the deceased, for recovering, transferring or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount of value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be), shall not be included in the amount or value of the estate, in respect of which the stamp duty was paid on such probate or letters of administration.

By Sect. 36, That where the executors or administrators of any [534] person deceased shall be desirous of transferring or of receiving the dividends of any share, standing in the name of the deceased, of and in any of the Government or Parliamentary stocks or funds transferable at the Bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any other company, corporation, or society whatsoever, passing by transfer in the books of such company, corporation or society, under and by virtue of any such probate or letters of administration as aforesaid, and shall allege that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the said Governor and Company of the Bank of England, and for any such other company, corporation or society as aforesaid, or their

respective officers, for their indemnity and protection, to require such affidavit or affirmation of the fact, as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to permit such executors or administrators to transfer the stock or fund in question, or receive the dividends thereof, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects; and where the executors or administrators of any person deceased shall have occasion to recover any debt or debts, or other personal effects, due or apparently belonging to the deceased, and shall allege that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the person or persons liable to pay or deliver such debt or debts or other effects, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to pay, deliver, or make over the debt or debts, or other effects in question, to such executors or administrators, or as they shall direct, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the [535] letters of administration of his or her effects: And where the executors or administrators of any person deceased shall have occasion to assign or transfer any debt or debts due to the deceased, or any chattels real, or other personal effects, whereof or whereto the deceased was possessed or entitled, and shall allege that the same respectively was or were due to or vested in the deceased, either wholly or partially, as a trustee, it shall be lawful for the person or persons, to whom or for whose use such debt or debts, chattels real, or other personal effects, shall be proposed to be assigned or transferred, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to accept the proposed assignment or transfer, without regard to the amount of the stamp duty on the probate of the will of the deceased or the letters of administration of his or her effects.

Sect. 37. That upon any such requisition as aforesaid the executor or executors, administrator or administrators of the deceased, or some other person or persons to whom the facts shall be known, shall make a special affidavit or affirmation of the facts and circumstances of the case, stating the property in question,

and that the deceased had not any beneficial interest whatever in the same, or no other beneficial interest therein than shall be particularly mentioned and set forth (as the case may be) in trust for some other person or persons, whose name or names, or other sufficient description, shall be specified in such affidavit or affirmation, or for such purposes as shall be specified therein; and that the beneficial interest of the deceased, if any, in the property in question, doth not exceed a certain value to be therein also specified, according to the best estimate that can be made thereof, if reversionary or contingent, and that the amount or value of the estate, for which the stamp duty was paid on the probate of the will of the deceased, or on the letters of administration of his or her effects, is sufficient to include and cover such beneficial interest [536] rest of the deceased, as well as the rest of the personal estate, whereof or whereto the deceased was beneficially possessed or entitled, and for which such probate or letters of administration shall have been granted, as far as the same have come to the knowledge of such executor or executors, administrator or administrators; and where the affidavit or affirmation of the facts and circumstances of the trusts shall be made by any other person than the executor or executors, administrator or administrators of the deceased, such executor or executors, administrator or administrators, shall make affidavit or affirmation, that the same are true to the best of his, her, or their knowledge, and that the property in question is intended to be applied and disposed of accordingly; which affidavits or affirmations shall be sworn or made before a Master in Chancery, ordinary or extraordinary, (who is hereby authorized to take the same, and administer the proper oath or affirmation for that purpose,) and shall be delivered to the party or parties requiring the same, and shall be sufficient to indemnify and protect the party or parties acting upon the faith thereof; and if any person or persons making any such affidavit or affirmation as aforesaid, shall knowingly and wilfully make false oath or affirmation, of or concerning any of the matters to be therein specified and set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.

By Sect. 43. Commissioners are authorized to remit penalties incurred before passing this act, by non-payment of the duty an

legacies, if the duty in arrear shall be paid on or before 31st January 1809.

Sect. 44. That in all cases not provided for by the preceding clause, where any receipt or discharge given for any legacy, or for the residue or any share of the residue of any personal estate, which shall have been given by will or other testamentary instrument, or have devolved to any person or persons upon intestacy, [537] shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty which shall be payable in respect thereof, together with the penalty incurred in consequence of the same not having been brought to be stamped before the expiration of such three calendar months; and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped within twenty-one days after its being received in Great Britain, it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof; any thing contained in any former act or acts to the contrary notwithstanding.



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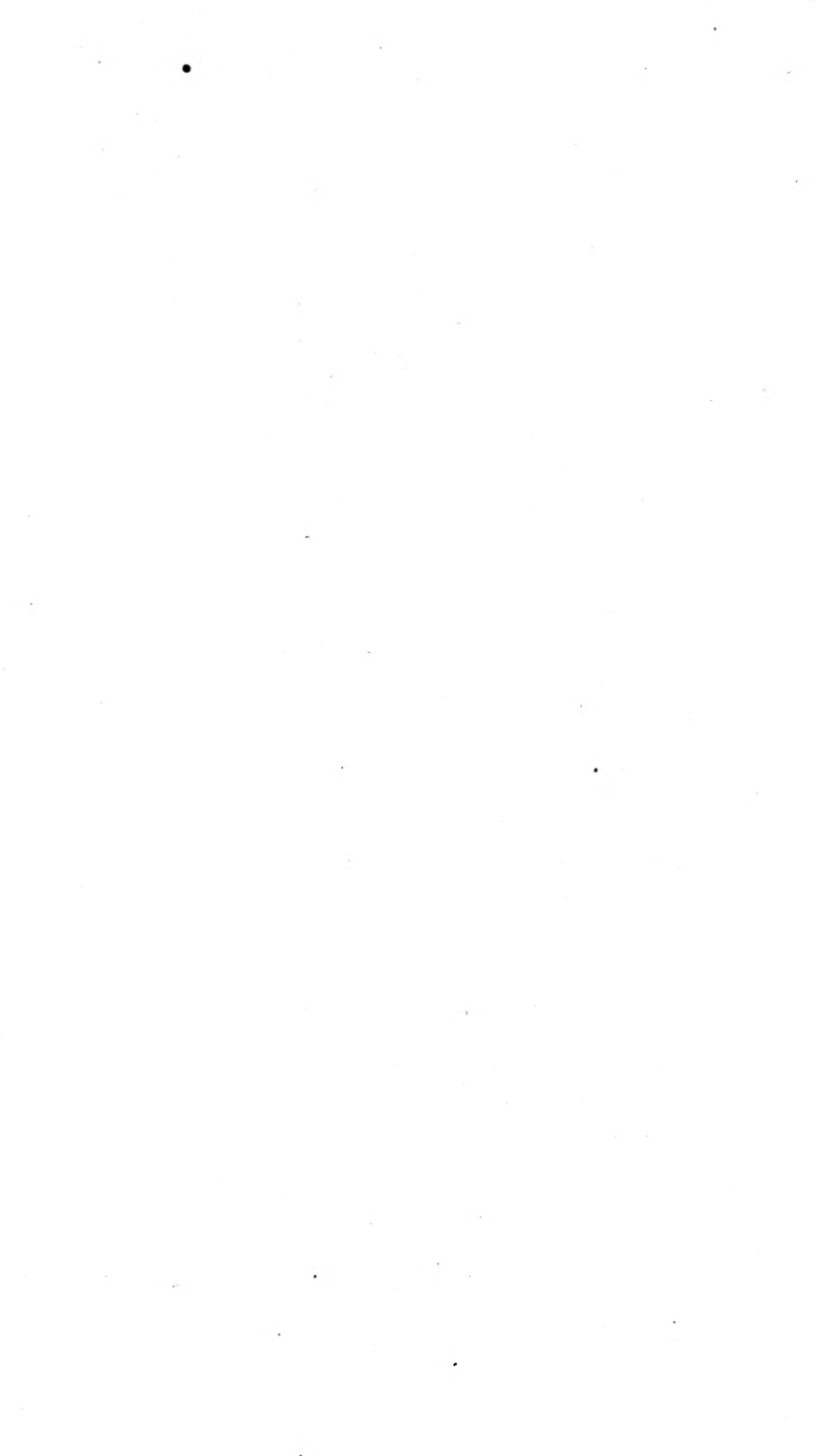
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